FILED
APR 12 1988

No. 87-868

In The
Supreme Court of the United States
October Term, 1988

The State of Wyoming,
Petitioner,
v.
United States of America,
Shoshone Tribe and Northern Arapaho Tribe
of the Wind River Indian Reservation, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Wyoming

BRIEF FOR TRIBAL RESPONDENTS

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April 12, 1988

Wilkes - Gage Printing Co., Inc. - 783-6006 - Washington, D.C. 20001

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QUESTION PRESENTED

In *Arizona v. California*, 373 U.S. 546 (1963), this Court quantified the water reserved for farming purposes when the five Indian reservations at issue in that case were established. In quantifying the reserved water, this Court, after considering other proposed quantification standards, ruled that the practicably-irrigable-acreage standard—awarding "enough water . . . to irrigate all the practicably irrigable acreage"—was "the only feasible and fair way by which reserved water for the reservations can be measured." *Id.* at 600, 601. This standard was selected, as the Court later summarized, because it "allowed a present water allocation that would be appropriate for future water needs." *Arizona v. California*, 460 U.S. 605, 617 (1983).

The question presented is:

Whether the Wyoming courts erred by using the practicably-irrigable-acreage standard in quantifying the water reserved for farming purposes when the Wind River Indian Reservation was established pursuant to the Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
History of the Wind River Indian Reservation	1
History of Irrigation Development on the Reservation	3
History of the Adjudication	7
The Decisions Below	8
The Court's Grant of Certiorari	11
SUMMARY OF THE ARGUMENT	11
ARGUMENT	14
I. Wyoming Is Wrong in Contending that Its Own State Courts Have Inflicted an Injustice upon Wyoming's Non-Indian Water Users	14
II. The Wyoming Courts Did Not Err by Using the PIA Standard To Quantify the Water Reserved Under the 1868 Treaty for the Purpose, as Recognized by This Court in *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938), of "Help[ing] To Create an Independent Permanent Farming Community upon the Reservation."	21
A. The PIA Standard, as This Court Ruled in *Arizona I*, Is the Most Appropriate Means for Deriving a Fixed Present Determination that Adequately Measures the Irrigation Needs Not Only of the Present Indian Population but Also of Future Generations	22
B. This Case, as the Wyoming Courts Correctly Held, Is Indistinguishable from *Arizona I*	24
C. Wyoming Has Advanced No Persuasive Reason Why the Wyoming Courts Should Not Have Applied the PIA Standard in This Case	28
1. The Post-*Arizona I* Cases Relied upon by Wyoming Are Entirely Consistent with and Indeed Cite Approvingly to the PIA Ruling in *Arizona I*	28

TABLE OF CONTENTS—Continued

Page

2. There Is No Merit to Wyoming's Argument that the Wyoming Courts Erred in Quantifying the Reserved Right by Failing to Consider the Competing Interests of Non-Indian Water Users 32

3. There Is No Merit to Wyoming's Proposed Limitation of the Tribes' Reserved Right to the Amount of Water Necessary for the Historically Irrigated Acreage for Which the Indians Have No Protective State Water Permits 34

a. Limitation of the Treaty Right to Water Historically Used Would Abandon Eighty Years of Precedent on Which Indian Tribes Have Reasonably Relied 35

b. Wyoming Has Made No Showing that the Tribes Have Had "Ample Opportunity" Fully To Develop Their Water Resources 38

c. Wyoming's Argument that Protective State Permits Supersede Vested Treaty Rights Is Not Properly Before the Court and Is Devoid of Merit 40

4. There Is No Merit to Wyoming's Argument that the Tribes Received an "Unjustified Windfall" or an Excessive Amount of Water from the Quantification Based on PIA 43

5. Wyoming's Proposed Quantification Standard Is at Odds with This Court's Prior Decisions 47

III. Any Modification of the PIA Standard Should Be Prospective Only 48

CONCLUSION 50

APPENDICES

TABLE OF AUTHORITIES

CASES: Page

Arizona v. California, 373 U.S. 546 (1963) ..... *passim*
Arizona v. California, 376 U.S. 340 (1964) 26, 35, 45
Arizona v. California, 439 U.S. 419 (1979) 44
Arizona v. California, 460 U.S. 605 (1983) 11, 12, 13, 22, 23
Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) 49
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 42
Cappaert v. United States, 426 U.S. 128 (1976) 12, 14, 28-33
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 18
Chevron Oil v. Huson, 404 U.S. 97 (1971) 49
Choctaw Nation v. United States, 318 U.S. 423 (1943) 25, 31
Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908) 36
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 48, 49
McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973) 31
Menominee Tribe v. United States, 391 U.S. 404 (1968) 31, 42
Nevada v. United States, 463 U.S. 110 (1983) 13
Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 13
Shoshone Tribe v. United States, 299 U.S. 476 (1937) 2, 27
Skeem v. United States, 273 F. 93 (9th Cir. 1921) .. 38
United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957) 36-37
United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971) 35
United States v. Kagama, 118 U.S. 375 (1886) 18
United States v. Hampleman, No. 753 (D. Wyo. 1916) 6, 42
United States v. Mazurie, 419 U.S. 544 (1975) 3, 24

TABLE OF AUTHORITIES—Continued

Page

United States v. McIntire, 101 F.2d 650 (9th C... 1939) 16
United States v. New Mexico, 438 U.S. 696 (1978) 28-34
United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926) 6, 14, 15, 42
United States v. Powers, 305 U.S. 527 (1939) 11, 35, 36
United States v. Shoshone Tribe, 304 U.S. 111 (1938) 2, 4, 17, 21, 24, 25, 31, 32
United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939) 37
United States v. Winans, 198 U.S. 371 (1905) 26
United States v. Winters, 143 F. 740 (9th Cir. 1906) 37
Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) 31-32
Winters v. United States, 207 U.S. 564 (1908) ..... *passim*

STATUTES:

34 Stat. 3208 (Part 3) 4
41 Stat. 1367 7
Act of April 21, 1904, § 25, 33 Stat. 224 42
Act of March 3, 1905, 33 Stat. 1016 ..... 4, 5, 15
Act of August 1, 1914, 38 Stat. 582 6
First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863) 2, 35
Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673 ..... *passim*
Wyo. Stat. Ann. §§ 41-4-501-512 (1985 & Supp. 1988) 17

MISCELLANEOUS:

Agreement Regarding Water Rights in the Crowheart Irrigation Unit on the Wind River Indian Reservation (July 29, 1988) 19
Bureau of Indian Affairs, Lands Under Jurisdiction of the Bureau of Indian Affairs (1984) 3

TABLE OF AUTHORITIES—Continued

Page

Bureau of Reclamation, U.S. Dep't of Interior, 1984 Summary Statistics, Vol. III 7
California's Proposed Findings of Fact and Conclusions of Law, *Arizona v. California*, No. 8 Original (April 1, 1959) 42
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Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess. (1971) 40
Memorandum of Solicitor of Interior, Feb. 1, 1964, *reprinted in* II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 1930 (n.d.) 44
National Water Comm'n, *Water Policies for the Future—Final Report to the President and to the Congress of the United States* (1973) 35, 39, 40
Opening Brief for Arizona, *Arizona v. California*, No. 8 Original, Oct. Term 1961 .....35, 48, 61
Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original (Dec. 5, 1960) .. 22, 23, 45
Riverton (Wyo.) Ranger, Aug. 3, 1988 20
Special Irrigation Report and Recommendations Prepared for the Deputy to Assistant Secretary —Indian Affairs (Trust and Economic Development), July 1988 6
State of Wyoming Press Release, "Sullivan, Tribes Sign Interim Agreement" 19, 21
Tribal-State Interim Settlement Agreement on Tax and Water Issues (Feb. 17, 1989) 19-21
C. Wilkinson, *American Indians, Time, and the Law* (1987) 38
"W.I.N.D.S." Project, Wind River Indian Needs Determination Survey, Executive Summary of Final Report, Vol. I (Aug. 1988)..... 46-47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-309

THE STATE OF WYOMING,
Petitioner,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF FOR TRIBAL RESPONDENTS

STATEMENT OF THE CASE

This case concerns the water reserved for the Shoshone and Northern Arapaho Indian Tribes under the Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673, pursuant to which the Wind River Indian Reservation was set apart as a permanent homeland—originally for the Shoshone Tribe and, later, for both the Shoshone and the Northern Arapaho Tribes (the "Tribes").

History of the Wind River Indian Reservation

In 1868, the United States and the Shoshone Tribe, which were military allies and had long maintained friendly relations, entered into the Second Treaty of Fort Bridger (the "1868 Treaty"). 15 Stat. 673; Petitioner's Appendix ("Pet. App.") 9a, 793a. Under its terms, the parties "set apart" a tract of land—approximately

3,054,182 acres—in what was later to become the State of Wyoming "for the absolute and undisturbed use and occupation of the Shoshonee Indians . . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." 1868 Treaty art. 2. The Shoshone Tribe agreed to make this reservation, now known as the Wind River Indian Reservation (the "Reservation"), its "permanent home." *Id.* art. 4. The Tribe further agreed to "relinquish all title, claims, or rights" to a vast tract of 44,672,000 acres of land in what are now the States of Wyoming, Colorado, and Utah that had been delineated as "Shoshonee country" in an earlier treaty, the First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863). 1868 Treaty art. 2; Pet. App. 9a.

The Shoshones had been a nomadic people dependent upon hunting and fishing for their subsistence. Pet. App. 9a, 617a-18a, 686a. Accordingly, they faced an enormous transition in converting from their nomadic ways to life on the Reservation.

An important purpose of the 1868 Treaty was to assist the Shoshones in making this transition by "help[ing] to create an independent permanent farming community upon the reservation." *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938). In various provisions of the 1868 Treaty, arts. 3, 6-10, 12, the United States agreed to assist and encourage the Indians to "commence cultivating the soil for a living," such as by providing those Indians who "shall desire to commence farming" with seeds, farming implements and instruction, and individual allotments of Reservation land, arts. 6, 8.

The United States had permitted the Shoshones, whose "loyalty . . . to the people of the United States has been conspicuous and unfaltering," *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), to select the lands that were to comprise the Reservation. Petition ("Pet.") 4. The Shoshones selected lands that were ideally suited for

irrigated farming. Although the Reservation is "located in a rather arid portion of central Wyoming," *United States v. Mazurie*, 419 U.S. 544, 546 (1975), and its rainfall is inadequate to support farming without irrigation, Pet. App. 211a, its streams and rivers are fed by the ample run-off from the Wind River Mountains. Indeed, the lands selected by the Shoshones were in "the choicest and best-watered portion of Wyoming" and included "fertile river valleys conveniently irrigable." *United States v. Shoshone Tribe*, 304 U.S. at 114. These lands were reserved under the 1868 Treaty as the permanent homeland of the Shoshones before the Territory of Wyoming was created and more than twenty-one years before Wyoming was admitted into the Union in 1890.

In 1878, the Northern Arapahoes were permanently settled by the United States on the Reservation, Pet. App. 9a-10a, and the Reservation has since been the permanent homeland for both the Shoshone and the Northern Arapaho Tribes.

In 1872 and 1896, the Tribes agreed to cede to the United States certain portions of the original Reservation in return for cash payments. Pet. App. 409a-10a. These cessions reduced the Reservation to its current size of approximately 2.5 million acres.[1] *Id.* at 533a.

History of Irrigation Development on the Reservation

The transition to Reservation life proved to be slow and difficult, and, notwithstanding the ample water and fertile lands on the Reservation, the early attempts of the Indians to develop a farming economy failed. *Id.* at 10a. Indeed, by 1895 the Tribes had become totally dependent on the United States for food, clothing and shel-

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[1] The Wind River Reservation is the third largest Indian reservation in the United States, Bureau of Indian Affairs, Lands Under Jurisdiction of the Bureau of Indian Affairs 4-31 (1984), and comprises an area larger than the States of Delaware and Rhode Island combined.

ter. *Id.* These economic misfortunes compelled the Tribes to sell a portion of the Reservation in the 1896 cession as a means of raising desperately needed cash. *Id.*

In 1904 the Tribes, still experiencing substantial problems in developing a farming economy, entered into an agreement with the United States (the "1904 Agreement") pursuant to which the northern two-thirds of the Reservation were to be made available for land sales to non-Indians.[2] The 1904 Agreement was ratified by Congress in the Act of March 3, 1905 (the "1905 Act"), 33 Stat. 1016; Pet. App. 769a, and the northern portion of the Reservation was opened to non-Indian settlement in 1906.[3] 34 Stat. 3208 (Part 3).

Because the legal status of Indian reserved water rights had not been resolved at the time of the 1904 Agreement —four years before this Court's decision in *Winters v. United States*, 207 U.S. 564 (1908)—, federal officials and the Tribes sought to secure additional protection under state law for the water rights of the Indians in the event that their reserved rights under the 1868 Treaty were not sustained by the courts.[4] Pet. App. 28a-29a.

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[2] Under the 1904 Agreement, the United States was not obligated to sell any of the opened lands, but simply agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and to pay over to them the proceeds received from the sale thereof only as received." 33 Stat. 1018.

[3] Land sales under the 1905 Act fell far short of expectations; less than ten percent of the opened lands were purchased. Pet. App. 412a-13a. The Secretary of the Interior discontinued such sales in 1934, and later "restored" the unsold lands to tribal ownership. *Id.* at 413a. The opening of the northern portion of the Reservation to non-Indian settlement under the 1905 Act did not result in a disestablishment of that portion of the Reservation. *Id.* at 31a-32a, 417a-19a.

[4] This concern arose as a result of two pressing considerations in 1904: (1) the non-Indians who would soon be entering the Reservation under the 1904 Agreement would immediately begin the race to the stream under the state-law doctrine of prior appropriation, and (2) this race was to begin when there was necessarily "some

Accordingly, under the 1904 Agreement, a portion of the Indians' proceeds from the sales of their land—if any balance remained after other specified payments were made—was earmarked for acquiring protective state water rights.[5] Between 1905 and 1915, federal officials obtained protective state water permits on behalf of the Indians to irrigate approximately 145,000 acres of land.[6] Wyoming Brief ("Br.") 5. Permits for the vast majority of this acreage were obtained in 1905, the year before the Reservation was opened to non-Indian settlement. J.A. (Wyo. Sup. Ct.), Vol. VII, 520-22.

After this Court decided *Winters*, federal officials began asserting reserved water rights under the 1868 Treaty on the Reservation, while also continuing to pursue pro-

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uncertainty in the status of Indian water rights" before this Court's 1908 ruling in *Winters*. Pet. App. 28a. If the courts later determined that there were no reserved water rights under the 1868 Treaty, and the Indians had not secured protective state water rights, the Indians would have lost the race before it began.

[5] Article III of the Agreement (as later incorporated in the 1905 Act) provided that, of the total proceeds derived from the sale of Indian lands, $85,000 was to be devoted to making a per capita payment of $50 dollars to each Indian, and

> any balance remaining [of the $85,000 sum after the per capita payments were made] shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

33 Stat. 1017. Under Article IV of the Agreement, $150,000 of the Indians' proceeds was earmarked for the construction of irrigation projects. Pet. App. 772a.

[6] This is the figure asserted by Wyoming, and the Tribes accept it as approximately correct, though it may be subject to relatively minor adjustments—downward for certain duplicative permits and upward for permits obtained by others besides the United States. No findings were made by the state courts as to the amount of Indian permitted acreage because Wyoming's present "ample opportunity" argument was not litigated there.

tective state permits. Pet. App. 30a. In 1911, a dispute arose when the State Water Commissioner closed the headgates on an allottee's ditches, claiming that the allottee did not have a valid state permit. *Id.* The United States later filed suit asserting reserved water rights under the 1868 Treaty, and the federal district court enjoined the Commissioner from interfering with the rights of the Indian farmer.[7] In 1926, the United States again filed suit to protect the reserved water rights of allottees on the Reservation, and the federal district court expressly recognized the existence of reserved water rights under the 1868 Treaty.[8]

Over the years, the United States has provided a total of $4.4 million to construct and maintain Indian irrigation projects on the Reservation.[9] As a result of this limited financial support and the hard work of Indian farmers, there are more than 54,000 acres of historically irrigated Indian land. Pet. App. 463a-531a. But the fed-

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[7] Bill of Complaint, United States v. Hampleman, No. 753 (D. Wyo.) (Sept. 5, 1913), J.A. (Wyo. Sup. Ct.) Vol. VIII, Ex. 2 at 3 ("[I]t was the intention of the parties to said treaty that all water within the boundaries of said reservation . . . should be reserved for the perpetual use of said Indians."); United States v. Hampleman, No. 742 (U.S.D.C. Wyo. June 25, 1916) (ruling that the water rights of the Indians "are within the absolute and exclusive jurisdiction" of the United States) (reproduced as Exhibit A to the Tribes' Opp. Cert.).

[8] United States v. Parkins, 18 F.2d 642, 643 (D. Wyo. 1926) ("The treaty in this case, like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character. Winters v. United States, 207 U.S. 564.").

[9] Wyoming provides a figure of some $2.3 million, Br. 5, but the Tribes do not wish to understate the full extent of federal support, which was a total of $4.4 million from 1905 through 1987. Special Irrigation Report and Recommendations Prepared for the Deputy to Assistant Secretary--Indian Affairs (Trust and Economic Development), July 1988. The Tribes were apparently required to reimburse the United States for at least some of these federal expenditures. *See* Act of August 1, 1914, 38 Stat. 582, 608.

eral goal of irrigating some 145,000 acres of Indian land has fallen far short of achievement, and today there remains at least another 54,000 acres of Indian land that is practicably irrigable but for which irrigation works have not been constructed. *Id.* at 532a-80a; 229a-30a.

The United States also has subsidized non-Indian irrigation development on the Reservation, but to a much greater extent. Non-Indians now irrigate 120,000 acres within the Reservation, Br. 4, including some 73,000 acres in the Riverton Reclamation Project, an almost exclusively non-Indian federal irrigation project withdrawn from the opened portion of the Reservation in 1921. Riverton Cross-Pet., No. 88-553, at 2; 41 Stat. 1367, 1404. The United States has spent more than $70 million on the Riverton Reclamation Project alone since its inception.[10]

History of the Adjudication

The State of Wyoming initiated this adjudication of the Tribes' reserved water rights under the Treaty more than a decade ago in Wyoming's own state courts in connection with a general adjudication of water rights in the Big Horn River Basin. The United States and the Tribes sought to defeat the State's choice of forum, but these efforts were strenuously and successfully opposed by the State. Pet. App. 11a-12a, 720a-23a.

In May 1979, the state district court appointed a Special Master approved by all the parties to conduct the adjudication. The Master divided the proceeding into three phases. The first phase—the only one at issue here—was a determination of reserved rights under the 1868 Treaty. On December 15, 1982, after extensive discovery and a lengthy trial, *id.* at 13a-14a, the Master signed his 451-page Report and Proposed Decree regarding the water reserved for the Tribes. *Id.* at 367a.

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[10] Bureau of Reclamation, U.S. Dep't of Interior, 1984 Summary Statistics, Vol. III, Project Data at 309.

The Decisions Below

Rejecting the State's argument that water had not been reserved, the Master, relying upon *Winters* and its progeny, ruled that "Congress, by the Treaty of 1868, impliedly created a reservation for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty." *Id.* at 432a. The Master also rejected the State's argument that the so-called "water proviso" to the 1905 Act (*see supra* note 5) was inconsistent with or had abrogated the reserved right under the 1868 Treaty. *Id.* at 411a-20a, 436a-37a. The Master held that the purpose of the Treaty was to permit the Indians to develop the Reservation as a self-sustaining "permanent homeland" —a purpose that included, but was not limited to, the development of a farming economy on the Reservation. *Id.* at 441a-42a. Accordingly, the Master ruled that the reserved water included that necessary not only for irrigated farming but also for certain non-agricultural uses, including mineral development, municipal uses and fisheries. *Id.*

With regard to the Treaty's purpose of promoting irrigated farming, the Master, relying on *Arizona v. California*, 373 U.S. 546, 601 (1963), determined that the appropriate measure of the reserved right was the amount of water necessary to irrigate the Reservation's practicably irrigable acreage (the "PIA standard"). Pet. App. 532a. The major parties had agreed to a definition of "practicably irrigable acreage," [11] and Wyoming itself had urged the Master to apply the PIA standard. *See infra* pp. 29-30. In its pretrial pleadings, Wyoming asserted

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[11] The Master—pursuant to an agreement among the State, the United States, and the Tribes—defined "practicably irrigable acreage" as "those acres susceptible to sustained irrigation at reasonable costs." Pet. App. 534a. The Master explained that the PIA standard requires a "two part analysis": (1) whether the land is "susceptible to sustained irrigation" from the perspective of arability and engineering feasibility, and (2) whether the land is irrigable "at a reasonable cost." *Id.* The Master held that, in applying the PIA standard, current irrigation technology—as opposed to that in existence in 1868—should be used. *Id.* at 535a.

that there were some 102,000 practicably irrigable acres on the Reservation;[12] however, at trial, Wyoming challenged the vast majority of the some 150,000 acres claimed by the United States or the Tribes. Pet. App. 532a. The Master, after weighing the conflicting expert testimony, ruled against Wyoming on much of its rebuttal case regarding the amount of practicably irrigable acreage.[13] He concluded that there were some 54,000 practicably irrigable acres of so-called "historic" lands—land that was then or had previously been irrigated,[14] *id.* at 463a-531a, 643a-72a—and some 48,000 acres of "future lands"—land that had not been previously irrigated but was held to be practicably irrigable as parts of proposed irrigation projects.[15] *Id.* at 695a. The Master also quantified the water reserved under the 1868 Treaty for non-irrigation purposes. *Id.* at 696a-702a.

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[12] Wyoming's Response to the United States' Statement of Claims and to the Statement of the Shoshone and Arapahoe Tribes Concerning the Measurement of Tribal Reserved Water Rights, ¶¶ 17 and Appendix A (July 16, 1980) ("Wyoming's Response") (reproduced herein at Appendix A, pp. 4a-5a, 6a.) Wyoming asserted that there were 101,931 practicably irrigable acres requiring 323,176 acre feet of water per year. The acreage included 34,726 "historic" acres and 67,205 acres of "future lands." *Id.*

[13] The Master generally found that the evidence and testimony presented by the United States was "professional, competent, believable." *See* Pet. App. 495a; *see also id.* at 468a-69a, 471a, 473a, 474a, 539a, 545a, 549a, 553a, 555a-56a, 563a, 567a, 569a, & 575a. Nonetheless, the Master rejected some 50,000 acres that either the United States or the Tribes had contended at trial was practicably irrigable. *Id.* at 72a.

[14] The historic lands also included some 1,400 acres of arable, undeveloped land within existing irrigation projects. Pet. App. 471a-74a, 500a-02a.

[15] The Master recommended that the decree limit the construction of irrigation projects for the future lands to no more than ten percent of the total acreage in each subsequent decade, unless upstream storage was first constructed. Pet. App. 580a-84a. The district court rejected this recommendation. *Compare id.* at 234a-37a and 267a *with id.* at 194a-98a and 200a-01a.

The district court largely accepted the Master's recommendations, including the use of the PIA standard. *Id.* at 121a-31a, 168a-279a. But the district court adopted a narrower view of the purposes for which water had been reserved. *Id.* at 219a. Having concluded that "the sole purpose of the Reservation was [to promote Indian] agriculture," *id.* at 220a, the court reduced the total amount of reserved water to only that determined by the PIA standard. *Id.* at 221a.

The Supreme Court of Wyoming, affirming the district court, held that there was "an intent to reserve water" under the Treaty, *id.* at 26a; that the reserved right was not inconsistent with or abrogated by the water proviso of the 1905 Act, *id.* at 28a-32a, and that it was "correct [to] quantify[] the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage." *Id.* at 47a. Contrary to the Master's recommendation, the Supreme Court of Wyoming, by a vote of three to two, affirmed the district court's ruling regarding the purpose of the Reservation, holding that "the intent at the time [of the Treaty was] to create a reservation with a sole agricultural purpose." *Id.* at 38a. The majority thus affirmed the reduction of the amount of water reserved for the Tribes to only that quantified under the PIA standard.[16]

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[16] The Supreme Court overturned the district court's adoption of the Master's recommendation that the total amount of practicably irrigable "future lands" be reduced by ten percent to provide for a "margin of error." Pet. App. 56a-58a. The court reasoned that the reduction was inappropriate because "a margin of error works both ways." *Id.* at 57a.

In light of this ruling and certain stipulations among the parties, the final amount of reserved rights recognized by the state supreme court was 500,717 acre-feet for 108,221 acres of practicably irrigable land. This figure comprises 290,490 acre-feet for 54,216 acres of historically irrigable land, and 210,227 acre-feet for 54,005 acres of future lands. *See* Pet. App. 56a-58a, 172a, 182a, 531a, 559a, 580a.

The Court's Grant of Certiorari

Wyoming sought review of three issues in its petition for a writ of certiorari. Pet. at (i). This Court limited its grant of certiorari to the second issue: whether the Wyoming courts had erred by using the PIA standard to quantify the water reserved for farming purposes under the 1868 Treaty. 109 S. Ct. 863 (1989). One of the excluded issues was whether the water proviso to the 1905 Act was inconsistent with or had abrogated the reserved water right under the 1868 Treaty. Pet. at (i).

SUMMARY OF THE ARGUMENT

This Court has long recognized the existence and certain key characteristics of Indian reserved water rights. In *Winters v. United States*, 207 U.S. 564, 576-77 (1908), in *United States v. Powers*, 305 U.S. 527, 533 (1939) and again in *Arizona v. California*, 373 U.S. 546, 600 (1963) ("*Arizona I*"), this Court held that, when land is reserved to create an Indian reservation, there is also an implicit reservation for the use of the Indians of such previously unappropriated water as is needed to fulfill the purposes of the Indian reservation. These reserved water rights "vest[]" and become "effective" when an Indian reservation is created, in an amount necessary "to satisfy the future as well as the present needs" of the Indian reservation. *Arizona I*, 373 U.S. at 600. This vested property right is based not on notions of "judicial equity," *Arizona v. California*, 460 U.S. 605, 616 (1983) ("*Arizona II*"), but rather on the intent of the parties at the time the reservation was established.

In *Arizona I*, this Court addressed the same question presented here: how to quantify the water reserved for the present and future irrigation needs of an Indian tribe. After rejecting an equitable balancing approach and one based on the "reasonably foreseeable needs" of the Indians, the Court adopted the PIA standard, ruling

that it was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 600, 601. The PIA ruling in *Arizona I* was "hotly contested by the States, who argued that the [PIA standard was] a much too liberal measure." *Arizona II*, 460 U.S. at 617. Since then, this Court has repeatedly cited with approval to the PIA ruling in *Arizona I*, and has rebuffed two attempts by states to overrule that decision. *Cappaert v. United States*, 426 U.S. 128, 139 n.4 (1976); *Arizona II*, 460 U.S. at 625-26.

Wyoming here strikes at the heart of this Court's jurisprudence regarding Indian reserved water rights. Wyoming pays homage to the now-familiar complaints of some states that the PIA standard is neither "feasible" nor "fair" and wreaks havoc upon non-Indian water users. But Wyoming's true colors are best seen in the relief it is seeking: a limitation of the reserved right to water for historically irrigated acreage for which there are no protective state permits. The requested relief reveals that Wyoming's point is not that the PIA standard is an inappropriate means of quantifying water for present and future irrigation needs, but rather that the Tribes should not have any reserved water either for future irrigation needs or for lands covered by protective permits.

This Court should affirm the holdings of the Wyoming courts that the PIA standard is the appropriate measure of the reserved right under the 1868 Treaty for the farming needs of the Tribes. Wyoming admits that this Court's PIA ruling in *Arizona I* appeared to be a "universal standard." Br. 14. But Wyoming asserts that this case is distinguishable on its facts from *Arizona I* and that, in any event, the PIA ruling has been eroded by subsequent decisions of this Court. Neither point is correct, as even Wyoming acknowledged when it endorsed the PIA standard at the outset of this proceeding.

Wyoming's attempt to turn back the hands of time to before *Winters* should also be rejected. The argument that the reserved right should be limited to historic levels of irrigation flies in the face of this Court's consistent holdings for more than eighty years. It also rests on the wholly unsupported, and indeed shameful, premise that what Wyoming describes as "massive" infusions of federal expenditures on Indian irrigation projects—some $4.4 million, compared to more than $70 million in federal support for only one of the non-Indian irrigation projects on the Reservation—have provided the Tribes with an "ample opportunity" to reach full irrigation development. Wyoming's argument regarding the protective state permits is similarly devoid of merit, was specifically rejected over sixty years ago by the federal district court in Wyoming, and runs counter to this Court's most fundamental rules of Indian treaty interpretation.

What Wyoming seeks here is to change the rules that have governed the adjudication of Indian water rights not only since this Court's 1963 ruling in *Arizona I* but also since its 1908 ruling in *Winters*. Such a change is unwarranted, and would result in an extraordinary injustice to Indian tribes that have justifiably relied on this Court's prior decisions.

This Court has repeatedly admonished Indian tribes for failing to respect "the compelling need for certainty" in Western water-rights adjudications, *Arizona II*, 460 U.S. at 620; *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983); and has also underscored that "[s]ubstantive rules governing the law of real property are peculiarly subject to the principle of *stare decisis*." *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). These concerns apply with at least equal force to the arguments advanced here by Wyoming. The ruling below should be affirmed.

ARGUMENT

I. Wyoming Is Wrong in Contending that Its Own State Courts Have Inflicted an Injustice upon Wyoming's Non-Indian Water Users.

Wyoming labors mightily to create the impression that the quantification by its own state courts of the Tribes' reserved water right has unjustly disturbed the reasonable expectations of Wyoming's non-Indian water users. This suggestion is simply not true.[17] Because Wyoming has seriously distorted the facts, a few corrections are in order before turning to the question presented.

First, Wyoming seeks to create the impression that this proceeding is the first instance in which the United States or the Tribes have asserted the existence of reserved water rights under the 1868 Treaty. Br. 19-20. This suggestion is wholly unfounded. Wyoming has failed to disclose that, as the Supreme Court of Wyoming noted (Pet. App. 28a-31a), federal officials asserted reserved water rights on behalf of the Tribes soon after this Court's *Winters* ruling in 1908, have done so repeatedly since then, and twice—in 1916 and 1926—have sought and obtained relief from the federal district court in Wyoming to protect those rights. Indeed, Wyoming fails to disclose that—contrary to one of its principal arguments here—the federal district court more than sixty years ago expressly recognized that there are reserved water rights under the 1868 Treaty for Indian lands covered by protective state permits.[18] In short, it

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[17] In any event, this Court has repeatedly rejected the argument that reserved water rights are based on "an equitable doctrine calling for a balancing of competing interests." *E.g.*, Cappaert v. United States, 426 U.S. 128, 138-39 (1976); *see infra* pp. 32-34.

[18] In United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926), the court enjoined a non-Indian from diverting water from a federal irrigation project that had been constructed to serve the Indians and for which federal officials had secured protective state water

is Wyoming—not the United States or the Tribes—that is seeking to rewrite history in these proceedings.

Second, by failing to quote the "water proviso" of the 1905 Act in its entirety, Br. 19, and then by simply mischaracterizing it, *id.* at 31 n.43, Wyoming seeks to create the impression that the proviso was a decision by Congress to defer to Wyoming law for the acquisition of all water rights for the Reservation.[19] Wyoming has dog-

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permits. In so ruling, the district court acknowledged that "it is apparently the fact that *the Indian service*, in promulgating its irrigation project *and the officials of the state of Wyoming* for the purpose of protecting all landowners who may acquire water rights, *have co-operated along the line of taking out water for irrigating purposes with the consent of the state.*" *Id.* at 643 (emphasis added). But the district court concluded:

> It must be assumed, however, in the absence of any specific grant [to the State], that the government has reserved whatever rights may be necessary for the beneficial use of the government in carrying out its previous treaty rights; those rights having become fixed and established before the act of admission which made Wyoming a sovereign state. The treaty in this case, like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character.

Id., citing *Winters*. Thus, notwithstanding the protective state permits, the court recognized the existence of the water rights reserved under the 1868 Treaty.

[19] Wyoming asserts that, in enacting the water proviso, "Congress expressly directed that all actions be taken 'as are required by the statutes of the State of Wyoming in securing water rights from said State' for the Reservation." Br. 31 n.43 (emphasis deleted). Here, as in Wyoming's selective quotation of the proviso, *id.* at 19, Wyoming seeks to rewrite the proviso by failing to acknowledge that, by its express terms (*see supra* note 5), the proviso only governed how a portion of the Indians' own proceeds was to be spent if any balance remained after other specified payments were first made, and had no force beyond that. As confirmed by the legislative history and contemporaneous administrative interpretation of the 1905 Act, Congress enacted the proviso not, as Wyoming suggests, to require that all water rights for the Reserva-

gedly pursued this argument throughout this proceeding, but it was rejected at every level of Wyoming's own state-court system and excluded from this Court's grant of certiorari. As the Wyoming courts correctly held, the proviso was simply a pre-*Winters* safeguard pursuant to which a portion of the Indians' own funds was earmarked to secure protective state water rights in the event that the courts might later fail to recognize the Indians' reserved rights under the 1868 Treaty. Pet. App. 28a-32a.

Third, Wyoming argues that the amount of the reserved right quantified by the Wyoming courts based on the PIA standard—enough water to irrigate 108,000 acres—is excessive and unfair to non-Indian water users because the Indians have in the past irrigated no more than 54,000 acres. Br. 31-35. This complaint is belied by Wyoming's own position at the outset of this proceeding, when Wyoming asserted that there were 102,000 practicably irrigable acres of Indian land, including 67,000 acres of future lands. *See supra* note 12. Moreover, from an historical perspective, the amount of PIA —108,000 acres—is less than the irrigation goal of federal officials who obtained protective state permits for 145,000 Indian acres between 1905 and 1915. Br. 5. Indeed, because permits for 125,000 of those acres were obtained in 1905,[20] the year before the Reservation was opened to non-Indian settlement, the non-Indians who settled on the Reservation were on notice that federal

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tion be acquired under state law, but rather to honor the prudent pre-*Winters* request of the Tribes and federal officials to earmark some of the Indians' own proceeds from land sales to acquire protective state water rights. Pet. App. 28a-31a; Tribes' Opp. Cert. 19-25. Congress made similar arrangements for securing protective water rights on other Indian reservations prior to *Winters*. *See, e.g.*, United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939) (Flathead Indian Reservation); *infra* pp. 42-43 (Colorado River Indian Reservation).

[20] Joint Appendix (Wyo. Sup. Ct.), Vol. VII, at 520-22.

officials intended to irrigate far more than 108,000 acres of Indian land, and with water rights senior to the 1906 state priority dates held by most non-Indian irrigators on the Reservation.[21] In sum, contrary to the distorted impression created by Wyoming's fanciful statement of the case,[22] there is nothing unfair about the ruling below.

Fourth, Wyoming vastly overstates any impact that the ruling below may have upon the water available to current non-Indian water users. As a result of the ample run-off from the Wind River Mountains, the Reservation is in the "best-watered portion of Wyoming." *Shoshone Tribe*, 304 U.S. at 114. The Supreme Court of Wyoming held that here—unlike some instances involving reserved water rights—there is "no indication" that the use by the Tribes of their reserved water would cause a "gallon

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[21] *See infra* note 22. Some of the land covered by the 1905 permits has been sold by allottees to non-Indians. Under the state supreme court ruling, the non-Indian parties here who succeeded to 1905 state priority dates by acquiring lands from Indian allottees were permitted to obtain 1868 Treaty-based rights upon a proper showing on remand. Pet. App. 73a-74a.

[22] Wyoming's statement of the case is riddled with inaccuracies and distortions. Space constraints and Wyoming's failure to provide any citations to the record (contrary to this Court's Rule 34.1(g)) preclude a line-by-line correction, but two examples warrant mention. First, contrary to the impression Wyoming creates (Br. 4) that the Riverton Reclamation Project has a state-law priority date of 1905, the priority date both for that project and for the two other predominantly non-Indian projects on the Reservation—LeClair-Riverton and Riverton Valley—is 1906, all junior to the protective state permits for 125,900 acres acquired by federal officials on behalf of the Tribes in 1905. Plaintiff's Exh. WRIR MC-1, MV-3A and C-23327, and Master's Exh. 1. Second, contrary to Wyoming's description of the protective permits as "perfected state-awarded water rights," Br. 6, a permit under Wyoming law is simply permission to appropriate and is not a perfected right until the water is put to beneficial use and a certificate of appropriation is issued. *See* Wyo. Stat. Ann. §§ 41-4-501-512 (1985 & Supp. 1988). Even after the State has issued a certificate of appropriation, as it has done here for some Indian lands, the state water right may be lost through subsequent non-use. *Id.*

for gallon reduction in the water available for other [water] users." Pet. App. 71a. The Master, who was concerned that the full exercise by the Tribes of their 1868 Treaty rights "may" have an adverse effect on many non-Indian appropriators,[23] *id.* at 630a, noted that, with additional storage, the full exercise of those rights would have "virtually no adverse effect upon existing state water users of the Big Horn Basin."[24] *Id.* at 627a, 635a n.39.

Finally, the most egregious mischaracterizations in Wyoming's brief are those relating to events not disclosed

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[23] Wyoming sought to quantify the claimed adverse effect upon existing water users if the Tribes were to exercise their full 1868 rights. Pet. App. 631a-35a. In reviewing Wyoming's proof, the Master commented that he was "left . . . with a distinct feeling that the inputted assumptions were carefully crafted to secure the desired print outs." *Id.* at 633a. The Master noted that Wyoming's proof left "myriad doubts" but no answers to questions such as: "How much of an adverse effect on the junior rights? How much of an effect on [pre-statehood] territorial[] [water rights]?" *Id.* at 632a. The Master ultimately concluded that the full exercise of the reserved rights of the Tribes "may" have an adverse effect upon non-Indian water users, *id.* at 630a, but was unable to quantify any such effect. *Id.* at 632a-34a.

In its original Finding of Fact 98, the district court found that "the construction of any one or all of the future projects would have an adverse effect on other water users." Pet. App. 258a. But, as even Wyoming acknowledges, Br. 8, a subsequently assigned district judge later deleted that finding. Pet. App. 169a.

[24] By recent agreement, the State and the Tribes have taken interim steps to increase the water available to both Indian and non-Indian water users, and have agreed to enter into long-term negotiations to further the same objective. *See infra* note 27.

In any event, should any disruption of non-Indian water uses occur as a result of the Indians' use of their full PIA water entitlement, Wyoming can avail itself of a congressional remedy in light of Congress's broad power over Indian tribes. *See generally* Cherokee Nation v. Georgia, 36 U.S. (5 Pet.) 1 (1831); United States v. Kagama, 118 U.S. 375 (1886). Congress can act quickly and decisively to fund new water storage or to authorize other appropriate remedies, as it has done several times in approving Indian water-rights settlements. *See* Brief of Amici Native American Rights Fund *et al.*

in the record regarding the current relations between the Tribes and the State. Wyoming seeks to create the impression that the Tribes and the State are on the verge of open warfare. In fact, the relations between these sovereigns are now the best they have ever been, and hold much promise for the future. Only two months ago, the Tribes and the State entered into an agreement that was then described by the State as "a precedent-setting example of tribal-state cooperation on water and tax matters."[25] Appendix B hereto, at 9a. The agreement resolves for the next year the two most significant disputes between the State and the Tribes: (1) overlapping state and tribal taxation of oil and gas production on the Reservation,[26] and (2) water allocations. Interim Agree-

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[25] This cooperation was also evident during last summer's drought when a dispute arose regarding water allocations among Indian and non-Indian irrigators in one portion of an irrigation project on the Reservation. The Tribes and the State, working under an agreement signed by the Governor and the Chairmen of the Tribal Business Councils, persuaded the Bureau of Indian Affairs to make certain changes in water management that resulted in all water users' receiving their full water entitlements. (The agreement between the State and the Tribes is reproduced in Exhibit B of the Tribes' Opp. Cert. 3a-4a).

The "sting" that Wyoming suggests its non-Indian water users have already felt from the rulings below (Br. 9) was a three-week disruption in water deliveries that occurred while the State, the Tribes, and the United States were negotiating a resolution of last summer's dispute on the portion of that one irrigation project. The dispute arose because non-Indian irrigators had taken more than their fair share of the water from the project at the beginning of the summer. Moreover, as acknowledged by Wyoming's Governor and the Chairmen of the Tribal Business Councils, the dispute was "*not* the result of an actual shortage of water supply, but rather [was] the result of problems with the management of the water supply and of the need for structural improvement in the irrigation and delivery system." Agreement at 1 (emphasis added) (Exhibit B to Tribes' Opp. Cert. at 3a). Finally, significant steps have been taken to avoid a recurrence of this type of problem during the upcoming irrigation season. *See infra* note 27.

[26] Prior to the interim agreement, oil and gas production on the Reservation was subject to a state severance tax of six percent, a

ment ¶¶ 1-5 (reproduced herein at Appendix C). An important objective of the interim agreement is to provide an opportunity for the Tribes and the State to negotiate a long-term solution to these two disputes, with the assistance and financial support of the federal government. *Id.* at ¶¶ 9-10.

It is disappointing to the Tribes that Wyoming's litigators have sought here to obtain an advantage from this important step towards a negotiated resolution of these longstanding issues; it is even more disappointing that they have done so by blatantly mischaracterizing the agreement. The agreement does not, as Wyoming alleges here, relate only to water issues, Br. 10, 35, but rather resolves for the next year the disputes relating to both taxation and water.[27] When Wyoming's Governor signed

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county ad valorem tax of approximately seven percent, and a tribal tax of four percent. There has been a long-standing dispute regarding this overlapping taxation, and several oil companies have paid in excess of $10 million in state severance taxes under protest over the past decade. A recent study conducted by a national economic consulting firm retained by the Tribes revealed that during the period between 1979 and 1987—a period during which the Reservation's oil and gas reserves have been seriously depleted—the State and County collected $56 million more in taxes on the Reservation than they spent on services to the Reservation as a whole. Riverton (Wyo.) Ranger, Aug. 3, 1988, at 1. The Tribes contend that this state and county taxation has been unlawful.

[27] Wyoming asserts that, under the agreement, it has "agreed to forego tax revenues from the Reservation and provide other funds in the amount of $5,500,000, *simply to prevent the Tribes' enforcement of their Federal reserved water right during 1989*." Br. 10 (emphasis added). While it is true that the agreement resolves water allocations on the Reservation for this next year, it does far more, and Wyoming's litigators are well aware of that.

The State has secured the agreement of the Tribes during the next year "not [to] seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the Reservation." Interim Agreement ¶ 5. The Tribes could have brought suit or amended their own tax ordinance, which would have forced the Reservation oil and gas taxpayers to pay the Fremont County ad valorem tax into an escrow account, reducing the County's revenues by almost $4 million in 1989. In the interim

the interim agreement, he described it as "a historic first step" towards "facilitat[ing] the negotiation of a long-term settlement of the *tax and water* issues on the reservation," a step that "signifie[d] the strong desire of both the state and the tribes to resolve our disputes over *water and taxes* amicably and fairly for all parties." Appendix B, at 7a (emphasis added). In spite of the unfortunate treatment of these events here by Wyoming's litigators, the Tribes still join the hope expressed by the State that the parties will be able "to reach such an agreement during the coming year." *Id.* at 8a.

II. The Wyoming Courts Did Not Err by Using the PIA Standard To Quantify the Water Reserved Under the 1868 Treaty for the Purpose, as Recognized by This Court in *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938), of "Help[ing] To Create an Independent Permanent Farming Community upon the Reservation."

In *Arizona I*, this Court addressed the same question presented here: how to quantify the water reserved for

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agreement the State bargained for, and received, an agreement from the Tribes not to take such steps during the next year.

The agreement also includes important steps to prevent a recurrence of the type of water dispute that arose last summer, *see supra* note 25, and to increase the amount of water available for all water users. The agreement provides that "[t]he Tribes and the State, in coordination with the Bureau of Indian Affairs, shall cooperate in jointly monitoring and managing water allocations on the Reservation," and requires that $1,000,000 of the total payment to the Tribes be used "for rehabilitation and expansion of existing water delivery systems within the Reservation." Interim Agreement ¶¶ 2, 6. The expenditure of these funds will result in the availability of more water to both Indian and non-Indian irrigators. Moreover, the agreement earmarks $300,000 for studies of water-storage sites on the Reservation and additional improvements to the water-delivery systems. *Id.* at ¶ 8. These studies will seek to determine how to improve the availability of water for all water users. The interim agreement contemplates that any long-term agreement will include additional water storage and rehabilitation of existing water-delivery systems, and provides that "[t]he Tribes and the State agree to cooperate in seeking federal funding to offset these costs." *Id.* at ¶ 10.

the present and future irrigation needs of an Indian tribe. The Court, after considering and rejecting other proposed standards, ruled that the PIA standard was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 600, 601. The PIA standard, as this Court later summarized, was selected because it "allowed a present water allocation that would be appropriate for future water needs." *Arizona II*, 460 U.S. at 617.

This Court's PIA ruling in *Arizona I* was correct; it is fully consistent with prior and subsequent decisions of this Court, and this case is indistinguishable from *Arizona I*. Accordingly, the Wyoming courts were correct in using the PIA standard.

A. The PIA Standard, as This Court Ruled in *Arizona I*, Is the Most Appropriate Means for Deriving a Fixed Present Determination that Adequately Measures the Irrigation Needs Not Only of the Present Indian Population but Also of Future Generations.

In *Arizona I*, which involved five agricultural Indian reservations on or near the Colorado River, this Court agreed with the Master's conclusion that the PIA standard was the most appropriate means of quantifying the water reserved for irrigated farming. The Court first ruled that water had been reserved "to satisfy the future as well as the present needs of the Indian Reservations." *Id.* at 600. The Master had reasoned that, because the Indian reservations were created to be permanent tribal homelands, the United States must have intended to reserve water for the irrigation needs not only of the current Indian populations but also of future generations.[25]

The Court in *Arizona I* next addressed the question presented here: how to measure the reserved right in a manner that would allow, as later described in *Arizona*

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[25] Report of Simon H. Rifkind, Special Master, Arizona v. California, No. 8 Original, at 260-61 (Dec. 5, 1960) ("Master's Report").

II, "a fixed present determination of future needs for water." *Arizona II*, 460 U.S. at 623 (emphasis omitted). The Court considered and rejected two quantification standards proposed by Arizona, one involving a balancing of Indian and non-Indian interests,[29] and the other based on the Indians' " 'reasonably foreseeable needs,' which, in fact, means [a quantification based on] the number of Indians." 373 U.S. at 600-01. The Court rejected the latter because it would not yield a fixed present determination that adequately measured the irrigation needs of future Indian generations, for "[h]ow many Indians there will be and what their future needs will be can only be guessed." *Id.* at 601.

The Court then held that the PIA standard—a measure based on the farming potential of the Indian reservations—was the most appropriate means for deriving a fixed present determination of the irrigation needs of the Indians that would be adequate not only for their present populations but also for future generations. *Id.* at 600-01. Such a standard, as the Master had noted, was consistent with the intent in establishing these reservations: to create permanent Indian homelands based on self-sustaining farm economies. Master's Report at 262-63. The Master had also concluded that the PIA standard "will preserve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." *Id.* at 265. This Court agreed, concluding that the PIA standard was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 601.

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[29] 373 U.S. at 596-97 (rejecting Arizona's argument that the doctrine of equitable apportionment—"a method of resolving water disputes between States"—should be used in quantifying the reserved water rights of the Indians).

B. This Case, as the Wyoming Courts Correctly Held, Is Indistinguishable from *Arizona I*.

There is no meaningful distinction between this case and *Arizona I*. This Court has already recognized that an important purpose of creating the Reservation under the 1868 Treaty, as was true of the reservations in *Arizona I*, was to "help to create an independent permanent farming community upon the Reservation." [30] *Shoshone Tribe*, 304 U.S. at 118. This Court has also noted that the Reservation, as was true of those in *Arizona I*, is located in a "rather arid" region. *United States v. Mazurie*, 419 U.S. 544, 546 (1975). Thus, here, as in *Arizona I*, "water from the river [is] essential to the life of the Indian people . . . and the crops they raised." 373 U.S. at 599; Pet. App. 211a. Moreover, here, as in *Arizona I*, a population-based determination of the irriga-

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[30] The 1868 Treaty reveals an express intent to promote farming on the Reservation. The head of each Indian family who desired to "commence farming" was entitled to select a 320-acre tract, and each individual over eighteen not the head of a family was entitled to select an 80-acre tract "for purposes of cultivation." 1868 Treaty art. 6. These individuals and families were entitled to retain their tracts "so long as he or they may continue to cultivate it." *Id.* They were also entitled, upon a showing that they "intend[ed] in good faith to commence cultivating the soil for a living," to "receive seeds and agricultural implements" worth $100 in the first year of farming and $25 in each of the next three years, art. 8. The United States agreed to provide training to those Indians who shall "commence farming" and, for the first three years, to provide incentive payments to the ten Indians that grew "the most valuable crops," arts. 8, 12.

Although an important purpose of the 1868 Treaty was to promote irrigated farming, the principal purpose was to create a self-sustaining permanent Indian homeland a purpose that includes, but is not limited to, irrigated farming. Tribes' Cross-Pet. in No. 88-492, at 11-18. Accordingly, although the Tribes contend that the PIA standard is the proper standard for measuring irrigation needs, the Tribes also contend that other standards are appropriate to measure the non-irrigation needs of the Reservation.

tion needs of future generations would be based on sheer speculation.[31]

In addition, this Court has held that the terms of the 1868 Treaty "are to be construed in the sense in which naturally the Indians would understand them." *Shoshone Tribe*, 304 U.S. at 116; *accord Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). In light of the terms of the 1868 Treaty and its history, particularly the fact that the United States permitted the Shoshones to select a permanent home that included "fertile river valleys conveniently irrigable" in the "best-watered portion of Wyoming," 304 U.S. at 114, there can be no doubt that they "naturally . . . would [have] under[stood]" that, at the very least, their people, including future generations, would be permitted to use all the water needed to take advantage of the full farming potential of the Reservation.[32]

Wyoming asserts that there are "three obvious distinctions between the *Arizona I* reservations and the Wind River Indian Reservation." Br. 24. Each of these is easily dismissed. Wyoming first notes that the Indian reservations in *Arizona I* were comprised of "desert" lands, whereas "the Wind River Reservation comprises 'the best-watered portion of Wyoming.'" Br. 24-25. The implication seems to be that, unlike the reservation lands in *Arizona I*, the lands on the Wind River Reservation

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[31] The Indian population on the Reservation increased significantly in the past generation, from some 3,100 tribal members in 1950, Tr., Vol. IV, 407 (Jan. 1981), to some 4,500 in 1980, *see infra* note 66; and, according to projections accepted by the Master, the resident Indian population is expected to more than double to 9,740 in 2020. *Id.* The Indian population on the Reservation thus has been and will continue to be increasing dramatically, and any present population-based determination of the irrigation needs for the many generations beyond the year 2020 would be sheer speculation.

[32] Indeed, the most likely understanding of the Shoshones was that they were entitled to all the water from the streams on the Reservation.

will support farming without water for irrigation.[33] But this suggestion is simply untrue, and the district court expressly found to the contrary.[34]

Wyoming's second purported distinction is that the reservation lands in *Arizona I* were located in areas not considered to be "desirable," whereas the Shoshones, who were military allies of the United States, had requested the Wind River Reservation and received it from the United States as a "gift."[35] Br. 25. This is an odd point for Wyoming to highlight. The issue here turns on the intent of the parties to the 1868 Treaty, and the natural inference to be drawn from this supposed "distinction" is, if anything, that the parties to the 1868 Treaty would have intended a more generous reservation of water than that intended when the less "desirable" lands in *Arizona I* were reserved.

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[33] If Wyoming's point is simply that more water is required to irrigate an acre in the Southwest than is required on the Wind River Reservation, the PIA standard takes that altogether unremarkable "distinction" into account, and indeed the Shoshones and Northern Arapahoes received much less water per acre than the tribes in *Arizona I*. Those tribes received 905,496 acre-feet of water for 136,636 irrigable acres, Arizona v. California, 376 U.S. 340, 344-45 (1964), whereas the Tribes here received 500,717 acre-feet of water for 108,221 irrigable acres. *See supra* note 16.

[34] The streams on the Reservation receive ample run-off from the snowpack and glaciers of the Wind River Mountains, but rainfall during the growing season is sparse. As the district court found, "[m]uch of the reservation land was arid. The water was needed for irrigation and was essential to the raising of crops." Pet. App. 211a.

[35] Wyoming's suggestion that the Shoshones received the Reservation as a "gift" is both incorrect and offensive. In selecting the Reservation and agreeing to make it their permanent home, the Shoshones relinquished their claims to the vast tract of 44,672,000 acres delineated as "Shoshonee country" in an earlier treaty. As the Supreme Court of Wyoming recognized, the Big Horn Basin was "part of the vast hunting grounds of the peripatetic Shoshone Indians." Pet. App. 9a. Accordingly, as this Court held in United States v. Winans, 198 U.S. 371, 381 (1905), "the treaty was not a grant of rights to the Indians, but a grant of rights from them."

Finally, Wyoming argues that *Arizona I* is to be distinguished because, at the time that the Indian reservations in *Arizona I* were established, it was not then known which Indian tribes would live thereon, whereas "the Wind River Reservation was set aside specifically for the Shoshone Indians." Br. 25-26. This is no basis for distinguishing this case from *Arizona I*. As the Master in *Arizona I* noted, only in "*some* instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation";[36] in any event this point was not even mentioned in this Court's decision in *Arizona I*. Moreover, at the time the Wind River Reservation was established, it was contemplated that other Indian tribes might be settling there and making additional demands upon its water; 1868 Treaty, art. 2; and, since 1878, the Reservation has served as the permanent homeland not only for the Shoshones but also for the Northern Arapahoes. *Shoshone Tribe*, 299 U.S. at 494-95.

Wyoming's "obvious distinctions" are, thus, at best, distinctions without a difference. As the Wyoming courts correctly held, this case is indistinguishable from *Arizona I*.[37]

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[36] Master's Report 262 (emphasis added).

[37] Wyoming's attempt here to retry its failed PIA case, Br. 39-47, is not a question properly before this Court, and, in any event, was fully and fairly considered by its own state courts. Wyoming's further claim that the PIA standard is not "feasible" is fully answered by the Amici Native American Rights Fund *et al.* ("NARF"), and we understand will also be addressed by the United States. Suffice it to say here that the PIA standard provides a relatively objective standard that has worked reasonably well for resolving Indian water-rights disputes both in and out of court. Moreover, in a number of cases where the PIA standard has been applied, significant Indian economic development has resulted without any loss of water to non-Indian water users. *See* NARF Brief. The alternative standards proposed by Wyoming and the state amici would result in considerable uncertainty and confusion in the litigation and settlement of Indian water-rights disputes.

C. Wyoming Has Advanced No Persuasive Reason Why the Wyoming Courts Should Not Have Applied the PIA Standard in This Case.

1. *The Post-*Arizona I *Cases Relied upon by Wyoming Are Entirely Consistent with and Indeed Cite Approvingly to the PIA Ruling in* Arizona I.

Although acknowledging that the PIA ruling in *Arizona I* established what appeared to be a "universal standard," Br. 14, Wyoming asserts that it is at odds with this Court's "substantially different quantification approach[]" in three subsequent cases. *Id.* at 11. But these post-*Arizona I* decisions have not eroded the PIA standard. As even Wyoming admits (*id.* at 11 n.12), these later decisions cite approvingly to and draw support from this Court's PIA ruling in *Arizona I*.

Two of the cases relied upon by Wyoming concerned the water reserved for federal reservations. *Cappaert v. United States*, 426 U.S. 128, 141 (1976), a case concerning a national monument reserved to protect a unique fish species, is said to conflict with the PIA ruling because, in *Cappaert*, the Court noted that the district court had properly tailored its injunction to the "minimal need" for reserved water: the amount necessary to preserve the fish. Br. 13. *United States v. New Mexico*, 438 U.S. 696, 700 (1978), is said to conflict because, according to Wyoming, the Court there limited the reserved right to the water necessary to prevent the national forest's primary purpose from being "entirely defeated." Br. 13.

Neither of these cases is in conflict with *Arizona I*. In both *Cappaert* and *New Mexico*, the Court cited with approval to the PIA ruling in *Arizona I* for the proposition that the proper measure of a reserved right is "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141; *New Mexico*, 438 U.S. at 700. There was no express or implied criticism of the PIA standard, for *Arizona I* is

cited as supporting and being fully consistent with the result reached in both cases. Indeed, in *Cappaert* the Court's discussion of "minimal need" is preceded by a reference to the PIA standard.[38]

Wyoming itself has recognized that the PIA ruling in *Arizona I* is entirely consistent with *Cappaert* and *New Mexico*. In its pretrial pleadings, Wyoming equated "the minimal amount of water necessary to prevent the purposes of the Reservation from being entirely defeated"—the phrases from *Cappaert* and *New Mexico* that Wyoming now asserts are at odds with the PIA standard—with "a supply of water . . . for the irrigation of all practicably irrigable land on said Reservation."[39] Moreover, Wyoming admitted that, if a reserved right existed, that

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[38] In *Cappaert*, the Court's citation with approval to the PIA ruling in *Arizona I* appears at the beginning of the paragraph that concludes with the Court's observation that it was proper for the district court to tailor the injunction protecting the reserved right to "minimal need." 426 U.S. at 141. Thus, in relying upon *Arizona I*, the Court in *Cappaert* was apparently equating the PIA standard with the measure of "minimal need" for the irrigation requirements of an Indian tribe. Rather than criticizing *Arizona I*, the Court in *Cappaert* expressly reaffirmed it. 426 U.S. at 139 n.4.

In *New Mexico*, the Court observed, as Wyoming emphasizes, that "[e]ach time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." 438 U.S. at 700. But, since *Arizona I* is cited for that proposition, *id.* at 700 n.4, the Court's observation in *New Mexico* is not at odds with the PIA ruling. Moreover, when read in context, the Court's observation—and indeed the issue presented and the ruling in the case—relates not to the quantification of reserved rights but rather to a determination of the purposes for which water was reserved. *Id.* at 700-02. With respect to the issue of quantification, the Court in *New Mexico* cited approvingly to the PIA ruling in *Arizona I*, just as the Court in *Cappaert* had done. *Id.* at 700.

[39] Wyoming's Response, ¶¶ 11-14, 17; Appendix A hereto, at pp. 3a-5a.

right included water for the irrigation of all the Reservation's practicably irrigable land.[40] Thus, at the outset of this proceeding, even Wyoming was able to reconcile *Cappaert* and *New Mexico* with the PIA ruling in *Arizona I*. Accordingly, Wyoming should not be permitted now to complain that the United States and the Tribes failed to show the "minimal need" for water to prevent the purposes of the Reservation from being "entirely defeated." Wyoming had equated such a showing with the PIA standard, and the United States and the Tribes made such a showing at trial.

Nothing in the decisions in *Cappaert* and *New Mexico*, both of which involved federal reservations, should limit the reserved rights of the Shoshones and Northern Arapahoes. This case involves vested property rights to water reserved under a federal treaty for the needs of a permanent homeland for two Indian tribes, not the water reserved for a federal reservation to protect pupfish or trees. There are powerful arguments militating against a restrictive approach to the quantification of Indian reserved water rights.[41]

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[40] Wyoming "admit[ted] that, if a reserved water right was created on behalf of the Wind River Indian Reservation, *it was created solely to provide the Indians living thereon with a supply of water* for domestic uses, *for the irrigation of all practicably irrigable land on said Reservation*, and for stockwatering uses." Wyoming's Response, at ¶ 14; Appendix A hereto, at p. 4a (emphasis added).

Wyoming even argued strongly in favor of the PIA standard. Wyoming asserted to the Master that "the amount of the water necessary to irrigate all the practicably irrigable acreage . . . is the sum of the reserved water right, if any, on the Wind River Reservation, *and must govern in this case*." Wyoming's Brief in Support of Its Response to the Claims for Water Rights of the United States and the Shoshone and Arapahoe Tribes at 47 (emphasis added); Appendix D hereto, at pp. 20a-21a. *See also* State's Proposed Special Master's Report (Part I) (April 9, 1982), p. 34; Wyoming's Brief on Objections to Special Master's Report (Mar. 18, 1983), p. 27.

[41] Water is typically reserved for an Indian tribe not by unilateral federal action but by a bilateral treaty—such as the 1868 Treaty in this proceeding—in which the reasonable expectations of the In-

The third case cited by Wyoming as marking a departure from *Arizona I—Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*"Fishing Vessel"*)—involved an apportionment of off-reservation fish between Indians and non-Indians. *Fishing Vessel* is distinguishable because it involved a treaty provision pursuant to which the Indians expressly had agreed to share that off-reservation resource "in common with all citizens of the Territory." [42] But, even if *Fishing Vessel* were applicable, there is no inconsistency with *Arizona I*. The Court in *Fishing Vessel* cited approvingly to *Arizona I* as an example of an apportionment of natural resources between Indians and non-Indians "that assured that the Indians' reasonable livelihood needs would be met." [43] 443 U.S. at 685-86.

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dians are a controlling factor, *e.g.*, Shoshone Tribe, 304 U.S. at 116; in which ambiguities are to be resolved in the Indians' favor, *e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 173 (1973); Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943), and which creates rights that cannot be abrogated without the payment of just compensation, *e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 413 (1968). Public lands of the federal government are generally subject to state regulation; Indian lands are not. The purpose in reserving federal land often is narrow and requires only a limited amount of water, as was true of the national forest in *New Mexico* (whose primary purpose was to conserve water flows and thereby increase the availability of water to downstream users, 438 U.S. at 705-13) and the national monument in *Cappaert* (whose purpose was simply to protect "the natural habitat of the [fish] species sought to be preserved," 426 U.S. at 141). By contrast, "since the primary purpose for which most Indian reservations were established was to provide for an economically self-sufficient place of residence, in most cases Indians are entitled to significantly greater quantities of water than other federal land areas." F. Cohen, *Handbook of Federal Indian Law* 584 (1982 ed.) (footnotes omitted) (hereinafter "F. Cohen").

[42] 443 U.S. at 674 (quoting Art. III of the Treaty of Medicine Creek).

[43] There is no evidence in the record to suggest that the quantification based on PIA will result in the Shoshones or Northern Arapahoes' receiving more than a "reasonable livelihood" or "mod-

Again, there was no express or implied criticism of the PIA standard. In any event, it is unclear what point Wyoming is trying to make regarding *Fishing Vessel*, for Wyoming seems to disavow its significance in the context of quantifying reserved rights for the irrigation needs of Indian reservations.[44]

In short, *Cappaert*, *New Mexico* and *Fishing Vessel* are all consistent with and indeed cite approvingly to *Arizona I*. Thus, as the Wyoming courts correctly concluded, Pet. App. 47a, the PIA ruling in *Arizona I* remains good law.

2. *There Is No Merit to Wyoming's Argument that the Wyoming Courts Erred in Quantifying the Reserved Right by Failing To Consider the Competing Interests of Non-Indian Water Users.*

Wyoming claims (Br. 35-39) that the PIA standard is inconsistent with the alleged teaching of *New Mexico*

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erate" living. To the contrary, the unemployment rate among Indians on the Reservation at the time of trial was 45 percent. Pet. App. 568a-69a. (*See also infra* pp. 46-47.) Wyoming sought to prove at trial not that the water would make the Indians rich, but rather that the future irrigation projects were not economically feasible.

[44] Wyoming argues that *Fishing Vessel* permits awards of natural resources "only in those amounts necessary . . . to provide reservation Indians a 'moderate living.'" Br. 13, citing *Fishing Vessel*, 443 U.S. at 686. Wyoming notes that, on an agricultural Indian reservation, it "may well be true" that "it may be impossible to generate a moderate living for its Indian residents based solely on agriculture." Br. 16. But Wyoming then concludes that any award of Indian reserved rights beyond current water use is a "windfall" to the Indians, even if, as Wyoming seems to recognize, the irrigation by the Indians of all their practicably irrigable land might still not provide them with a moderate standard of living. *Id.* at 31-35. Accordingly, Wyoming appears to be arguing that, if the Indians cannot reach a moderate standard of living with an award of their full treaty rights, those rights should be frozen to current water uses—a new and shockingly unfair canon of Indian treaty interpretation that would ensure that the Indians lack any water resources even to attempt to improve their standard of living. That would turn *Fishing Vessel* on its head.

that quantification of a reserved water right must take into account the water needs of non-Indians. In effect, Wyoming argues that *New Mexico* requires an equitable apportionment that balances the needs of the Indians against those of others. As Wyoming admits (Br. 37 n.53), none of the five post-*New Mexico* lower-court decisions applying the PIA standard has construed *New Mexico* in this fashion. In addition, *New Mexico* repeatedly cited with approval this Court's unanimous decision in *Cappaert*, which had considered and rejected the argument that "the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests." 426 U.S. at 138. The same argument was also considered and rejected in *Arizona I*. 373 U.S. at 596-97.

The sole issue in *New Mexico* was the identification of the purposes for which water was deemed to have been reserved for a national forest. Its holding was that, in light of the demonstrated awareness and concern in Congress regarding the limited water supply in the arid West at the time the national forest was created, water was deemed to have been reserved only for the "primary" purpose or purposes of the federal reservation, with the government relegated to securing water for "secondary" purposes under state law. 438 U.S. at 698-702. Nothing in *New Mexico* suggests that, once the primary purpose of the reservation has been identified, the quantification of the water needed to fulfill that purpose should be influenced by other factors. In fact, since the *New Mexico* standard of quantification is unequivocally the requirements of the federal reservation for its primary purpose, to allow any other factor to tilt the quantification exercise would be contrary to *New Mexico* itself.

In any event, far from ignoring the competing interests of non-Indian water users—which should not even

be considered in cases involving Indian reserved rights [45] —the Wyoming Supreme Court became the first court to invoke these interests in limiting the reserved water right of Indian tribes. While necessarily conceding that "non-agricultural activities on the reservation" were contemplated, Pet. App. 40a, the court accepted the State's contention that "[t]he primary activity was clearly agricultural," *id.* at 41a, and denied reserved water for all other purposes. The court concluded that, by defining the purpose of the reservation in what the court admitted was a "narrow" fashion, it had "evidence[d] a sufficient sensitivity to the water needs of other water users." *Id.* at 72a. The court went further; it also relied on "sensitivity" considerations in reducing the tribes' entitlement by quantifying the reserved water for historic lands on the basis of a higher water-use efficiency rate than historic efficiency levels.[46] *Id.* To press "sensitivity" considerations even further—to allow them to overthrow the well-established PIA standard of quantifying water reserved for an agricultural purpose—would be to render the principle of reserved rights virtually meaningless.

3. *There Is No Merit to Wyoming's Proposed Limitation of the Tribes' Reserved Right to the Amount of Water Necessary for the Historically Irrigated Acreage for Which the Indians Have No Protective State Water Permits.*

Wyoming argues that, because there has been "ample opportunity" (Br. 22; "ample time," Br. 30) for full irrigation development on the Reservation, the water reserved for the Tribes should not exceed that necessary

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[45] The significant distinctions between reserved rights on Indian and federal reservations (*supra* note 41) warrant the conclusion that in the case of Indian reservations not merely the primary purpose but all substantial purposes of the reservation should be taken into account in defining the reserved right to water.

[46] The Tribes have sought review of this ruling in their cross-petition in No. 88-492.

to irrigate the Reservation's historically irrigated acreage. Wyoming goes further and argues that, where historically irrigated land is covered by protective state water permits, the Tribes' vested treaty rights to reserved water are superseded by the permits; only historically irrigated land *not* covered by state permits would be entitled to a reserved right.

a. *Limitation of the Treaty Right to Water Historically Used Would Abandon Eighty Years of Precedent on Which Indian Tribes Have Reasonably Relied.*

Adoption of Wyoming's proposed "use it or lose it" rule would require the abandonment of long-standing precedent on which the Tribes have justifiably relied. There is no hint in *Winters* or its progeny that a reserved water right can be lost by non-use; indeed, the fact that it cannot be so lost is universally recognized as the crucial difference between the prior-appropriation and reserved-rights methods of acquiring interests in water.[47] In *Arizona I* this Court held that the reserved right "was intended to satisfy the future as well as the present needs of the Indian Reservations."[48] 373 U.S. at 600. Prior to *Arizona I*, in *United States v. Powers*, 305

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[47] *E.g.*, United States v. District Court in and for the County of Eagle, 401 U.S. 520, 523 (1971); Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 473 (1973); F. Cohen at 578.

[48] Wyoming is simply wrong in asserting that the ruling below "is in stark contrast to the decisions of other courts which have dealt with Indian reservations on which there has been ample time to reach full irrigation development." Br. 30. This Court has never imposed a deadline on the use of Indian reserved water rights. The Colorado River Reservation at issue in *Arizona I* had been receiving federal appropriations for Indian irrigation development since 1910, a fact that Arizona underscored. Opening Brief for Arizona, Arizona v. California, No. 8 Original, Oct. Term 1961, pp. 144-47; but this Court agreed with the Master's recommendation to quantify an amount of water for future irrigation projects on the Colorado River Reservation that was significantly larger than the award for future projects in this case. *See* Arizona v. California, 376 U.S. 340, 344-45 (1964) (decree).

U.S. 527, 533 (1939), the Court had rejected the theory that a reserved water right can be limited by partial exploitation: "Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other land from participation in essential water."

Wyoming claims that the Ninth Circuit in several pre-*Arizona I* cases held that "[w]hen there had been ample opportunity for substantial completion of development on a reservation, *e.g.*, when there had been a long history of irrigation, the foreseeable needs were considered as being identical to historic use." Br. 22. While these decisions are hardly dispositive today, Wyoming's description of them is so egregiously misleading as to require some comment, for in fact they are sharply opposed to Wyoming's position and support that of the Tribes.

Wyoming relies on *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908), as limiting reserved rights to the water needed for historic uses. *Conrad* was a suit for an injunction against upstream diversions that interfered with existing tribal uses; quantification of the tribes' entire reserved right was not in question—as indeed it would not be today in a similar procedural posture. Even in that context, however, the *Conrad* court held that the tribes were entitled to "whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements," 161 F. at 832, and that, since "the Indians . . . have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification." *Id.* at 835. The clear implication is that the reserved right extended to all the water in the stream to the extent that reservation land might be put to agricultural use in the future.

Wyoming's reliance on *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. de-*

nied, 352 U.S. 988 (1957), is equally misplaced. Wyoming suggests that the *Ahtanum* court limited the reserved rights to the Indians' needs "'in 1915, when the Indian ditch system had been completed.'" Br. 23, *quoting* 236 F.2d at 337. What Wyoming ignores is that by 1915 the Indians' needs had extended to substantially the entire flow of the stream, 236 F.2d at 327, and that the court held that the Indians had a "paramount right" to that amount, "regardless of the quantity remaining for the use of white settlers." *Id.* The court expressly rejected the argument that "the reservation of waters for the benefit of the Indians must be limited to the amount or quantity actually used beneficially by the Indians within some period of time or within what the court might find to be a reasonable time." *Id.* The possibility of further increased needs after 1915 was wholly academic, since the entire flow of the stream was necessary to meet the Indians' established needs by that date. *Id.* at 328.[49]

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[49] Wyoming also relies on United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939). There the court did award water only for historically irrigated lands, but based its holding on a master's factual finding that no more was needed in view of a decline in the Indian population of more than 37 percent since 1875. By contrast, the Master in this proceeding accepted a projection that the Indian population on the Wind River Reservation would more than double between 1980 and 2020. *See infra* p. 45. Additional water was awarded in *Walker River* for domestic, stockwatering and power purposes.

Finally, Wyoming observes that the appellate decision in *Winters*, 143 F. 740 (9th Cir. 1906), protected only existing irrigation, although even Wyoming concedes that there had not been "ample opportunity" for development of the Fort Belknap Reservation by 1906. *Winters*, like *Conrad*, was an injunction case, not a general stream adjudication; thus a decree against injury to existing uses was all that was necessary or that was requested. The court held that the Indians had reserved water "'*at least* to an extent reasonably necessary to irrigate their lands.'" 143 F. at 749 (emphasis added).

In *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921), it was likewise argued that the Indians were limited to water for historically irrigated lands. The court rejected the argument in language clearly anticipating the PIA standard:

> The purpose of the Government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them *as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.* (Emphasis added).

Thus, the consistent holdings both of this Court and of the Ninth Circuit over more than eighty years have promised Indian tribes that their reserved right to water will not be lost by a present inability to use it. Wyoming proposes that the Court now abandon that promise and apply retroactively a "use it or lose it" rule. Such a course would be as unfair as it is unwarranted. This Court has stood firm against arguments that would result in the loss of Indian property rights due to their non-use. *See generally* C. Wilkinson, *American Indians, Time, and the Law* 32-52 (1987).

b. *Wyoming Has Made No Showing that the Tribes Have Had "Ample Opportunity" Fully To Develop Their Water Resources.*

Wyoming's proposed limitation of the Tribes' reserved water right to historic lands depends entirely on the premise that they have already had "ample opportunity" to develop irrigated agricultural use of their Reservation, and thus that any land not yet so developed must be land not "needed" for that purpose.

This contention is without either merit or record support.[50] While Wyoming asserts (Br. 29) that the Tribes

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[50] There are no findings of fact to support Wyoming's argument, and it is unclear that this point was properly presented to the Wyoming courts.

received "massive amounts of congressionally mandated expenditures for the construction of irrigation projects," the total amount spent by the United States, to date, is some $4.4 million. *See supra* note 9. That figure is dwarfed by the more than $70 million of federal expenditures for some 73,000 acres of non-Indian irrigation in the Riverton Reclamation Project, only one of the several non-Indian projects on the Reservation. *See supra* note 10.

As Wyoming asserts (Br. 5, 28-29), by 1915 state permits had been acquired on behalf of the Indians for 145,000 acres of Reservation lands, but there are only some 54,000 acres of historically irrigated Indian land. Wyoming is blind to the significance of these figures. What they show is that there was early federal recognition that land far in excess of the award in this case was irrigable and that the Indians would need to irrigate it; that non-Indian settlers were fully on notice of these facts, but that the federal government failed to fulfill its early intentions and concentrated on developing irrigation projects for the benefit of non-Indians, to the neglect of its trust obligations to the Indians.[51]

In this respect the Wind River Reservation is typical of a federal bias in favor of non-Indian water development that has been called "one of the sorrier chapters" in "the history of the United States Government's treatment of Indian tribes."[52] "For political and institutional rea-

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[51] Wyoming itself appears to acknowledge that the Tribes have not had an ample opportunity for full irrigation development. In its certiorari petition, Wyoming conceded that "[f]rom 1905 to 1963 . . . delays in completing project construction . . . prevented timely application of water to beneficial use upon many Indian tracts." Pet. 5. These "delays" did not cease in 1963.

[52] Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 475 (1973).

> With the encouragement, or at least the co-operation, of the Secretary of the Interior—the very office entrusted with pro-

sons, the United States has failed to secure, protect, and develop adequate water supplies for many Indian tribes." [53] Exploitation of a legal right to water involves massive capital investment for which even prosperous fee owners typically look to governmental resources; Indians have been in a much worse position in seeking private financing, since much of their land could not be mortgaged or pledged as collateral.[54] Yet, ironically, "Congress has tended to give a higher priority to [irrigation] projects that benefit non-Indians." [55]

Wyoming now seeks to perpetuate this past discrimination by freezing the reserved rights of Indians only to the irrigated acreage that they were able to develop with federal funding during "one of the sorrier chapters" in the history of this nation's dealings with Indian tribes. But even if the existence of "ample opportunity" could warrant a departure from the PIA standard, no such departure is warranted here. Wyoming's argument fails on its own terms: the Tribes simply have *not* had "ample opportunity" to develop their water resources.

c. *Wyoming's Argument that Protective State Permits Supersede Vested Treaty Rights Is Not Properly Before the Court and Is Devoid of Merit.*

Wyoming further argues that, even with respect to the historically irrigated acreage, no treaty rights should

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tection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations . . . . With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects.

Id. at 474-75. *See also* Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 235-49, 907-14 (1971).

[53] F. Cohen 596-97.

[54] *Id.* at 598.

[55] *Id.*

be recognized to the extent that there are protective state permits to irrigate the land.

This argument is an attempt to circumvent the Court's limited grant of certiorari,[56] but, even if properly presented, the argument is devoid of merit. Wyoming claims that a state permit eliminates the need for a treaty right. But a treaty right is a vested property right not subject to loss by non-use, whereas a state permit remains an unperfected right until the water is put to beneficial use, *see supra* note 22; and, even if perfected, is subject to loss by non-use (Br. 34). Moreover, the treaty right entails an 1868 priority, while the state permits have priority dates in the 1905-1915 period (Br. 28). The rights are thus not equivalent.

Wyoming's theory that the treaty right of the Tribes should be superseded by the protective permits for each acre for which federal officials sought such permits would be an abrogation of a valuable property right because reserved rights "vest" and become "effective" at the time an Indian reservation is created. *Arizona I*, 373 U.S. at 600. Such a result finds no support in the legislative his-

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[56] Wyoming argues here that "[w]ater rights should not be granted under the [federal reserved right] doctrine when there is no demonstrated need for reserved water in addition to that water which is available to a reservation from state water rights which were acquired pursuant to congressional direction." Br. 17.

This is the same argument that Wyoming made in its certiorari petition in support of its request for review of Question 1, namely, whether the water proviso to the 1905 Act was inconsistent with or had abrogated the reserved water right under the 1868 Treaty. Pet. 17 n.17 ("[W]hen the needs of a reservation are met by express federal reliance upon state law, deference to state law should supersede the continued existence of any previously created implied reserved water right."). The Court excluded Question 1 from the limited grant of certiorari. 109 S. Ct. 863 (1989). In an effort to circumvent this limited grant, Wyoming has simply recast its water-proviso argument—that the provision of the 1905 Act regarding state permits supersedes the reserved rights—into an argument that the permits themselves supersede those rights.

tory or contemporaneous administrative interpretation of the 1905 Act, *see supra* note 19; runs counter to the ruling over sixty years ago of the federal district court in *Parkins*, *see supra* note 18; and would contravene well-settled principles of Indian treaty rights.[57]

Equally important, relegating the Tribes to state law for their water rights would subject this valuable Indian property right, the exercise of which occurs on Reservation lands by Indians, to state jurisdiction and control. Congress has not mandated such a result here, nor has Wyoming shown that it is appropriate or necessary. Subjecting the Tribes' water rights to Wyoming state law would be contrary to seventy years of precedent, *see Hampleman* and *Parkins*, and would invite the very state jurisdiction over on-reservation Indians and their natural resources that this Court has repeatedly denied in the absence of congressional consent or unless extraordinary circumstances require that result.[58]

Finally, Wyoming claims that the 1905 Act and the existence of state permits distinguish this case from *Arizona I*. In fact, in *Arizona I*, as here, Congress had enacted a pre-*Winters* statute[59] providing for the acquisition of protective water rights under state law for the Colorado River Reservation, and permits had been acquired pursuant to that statute.[60] Arizona argued, just as Wyoming does here, that these facts were inconsistent with the recognition of reserved water rights un-

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[57] Indian treaty rights may not be abrogated by implication or by the acts of subordinate federal officials; they may be abrogated only expressly and by act of Congress, subject to the payment of just compensation. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968). No such abrogation occurred here.

[58] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987).

[59] Act of April 21, 1904, § 25, 33 Stat. 224.

[60] California's Proposed Findings of Fact and Conclusions of Law, Arizona v. California, No. 8 Original, (April 1, 1959), at XIII-18.

der the instruments creating the reservation.[61] This Court deemed Arizona's contention so devoid of merit that it is not even mentioned in the Court's opinion.

4. *There Is No Merit to Wyoming's Argument that the Tribes Received an "Unjustified Windfall" or an Excessive Amount of Water from the Quantification Based on PIA.*

The water quantified by the Wyoming courts based on the PIA standard is neither an "unjustified windfall" nor an excessive amount of water.

Wyoming equates an "unjustified windfall" with *any* amount of reserved water in excess of current tribal use. That contention simply disputes this Court's ruling in *Arizona I* that water had been reserved for "the future as well as the present needs of the Indian Reservations." 373 U.S. at 600. It also ignores the fact that the amount of current tribal use is determined not even by present—let alone ultimate—tribal needs, but by the grossly inadequate past federal support for Indian irrigation projects. *See supra* pp. 39-40.

Wyoming seeks support for its claim that the Indians need no future water in the fact that the Tribes failed to object when the Bureau of Indian Affairs ("BIA") allowed a large block of protective state water permits to expire in 1963. This is utterly specious, as Wyoming well knows. As Wyoming previously acknowledged, the BIA ceased to seek extensions for these protective state permits "following the announcement of *Arizona v. California*." Pet. at 6. The permits were not abandoned because the *water* was no longer needed, but because the BIA, relying on this Court's decision in *Arizona I*, justifiably concluded that *protective state permits* were no longer needed.

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[61] Opening Brief for Arizona, Arizona v. California, No. 8 Original, Oct. Term 1961, pp. 142-43.

Wyoming also seeks support for its assertion in the fact that the Tribes may use some of that water for purposes other than farming. This is also specious. The fact that the Tribes may use the water now for another purpose does not mean that they do not need it or will not use it in the future for farming, if the necessary irrigation projects can be financed and constructed. Moreover, it is well settled that, once reserved rights are quantified, an Indian tribe, if it so desires, is free to use the water for other beneficial purposes.[62] This rule furthers important objectives: it promotes Indian sovereignty and self-sufficiency, and it promotes sound management of a scarce resource by permitting the Indians to put water to its most productive use. Thus, even if the Tribes were to elect in the future to devote some of the water to a purpose other than farming, that would not mean that the Tribes would have no future "need" for the water for farming, but rather that there are other possible uses that are more productive.[63]

Wyoming's further assertion that the PIA standard resulted in an excessive award is simply incorrect. From

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[62] Arizona v. California, 439 U.S. 419, 422 (1979); Memo. Sol. Int., Feb. 1, 1964, *reprinted in* II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, p. 1930 (n.d.).

[63] Wyoming seems to argue that, because farming may no longer be the most productive use of all water in this region, the Tribes should get no future water at all under the 1868 Treaty, but rather should apply to Congress for a new water entitlement (with a junior priority date), or for compensation. Br. 16, 49. But there is no reason why the Tribes should be stripped of all future water rights under the 1868 Treaty because, in 1989, farming on the Reservation—though economically feasible on some 54,000 untilled acres, as the courts below specifically found—may not be the most productive use of that water for the regional economy. The Tribes have a vested 1868 treaty right to this water. Wyoming's alleged concern that the water be put to its most productive use is answered, at least with respect to uses on the Reservation, by the rule that the Tribes are free to change uses of the water.

an historical perspective, the quantification based on PIA —enough water to irrigate some 108,000 acres on the Reservation—is far from excessive because, as Wyoming itself emphasizes, federal officials announced a goal and secured protective state permits to irrigate an even *larger* amount of Indian acreage before the Reservation was opened to non-Indian settlement. Moreover, the Reservation—which Wyoming argues was provided to the Tribes for the sole purpose of creating a permanent farming community—is comprised of approximately 2.5 million acres.[64] Pet. App. 533a. The rulings below thus recognize an entitlement to water sufficient for the Tribes to irrigate less than five percent of the Reservation's total acreage.[65]

Nor is the quantification excessive in view of the current and projected Indian population on the Reservation. The Indian population on the Reservation in 1980 was 4,550, and, according to projections accepted by the Master, that figure will more than double to 9,740 in 2020.[66] Thus the reserved water is now sufficient to irri-

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[64] Wyoming suggests that the amount of reserved water quantified for the Reservation is excessive because it was "greater than that for any of the *Arizona I* reservations, except for the massive Colorado River Reservation." Br. 41. What Wyoming fails to disclose is that the Wind River Reservation—the nation's third largest Indian reservation—is approximately *seven times larger* than all five Indian reservations involved in *Arizona I*. The total acreage of the *Arizona I* reservations is 335,500 acres, of which 136,636 was found to be practicably irrigable. Master's Report at 85-88. The annual diversion for these reservations was set at 905,496 acre feet annually. Arizona v. California, 376 U.S. 340, 344-45 (1964) (decree). By contrast, the Wind River Indian Reservation, which is larger than the States of Delaware and Rhode Island combined, consists of approximately 2.5 million acres, of which approximately 108,000 acres were found to be practicably irrigable, requiring an annual diversion of about 500,000 acre feet.

[65] Since non-Indians currently irrigate some 120,000 acres on the Reservation, Br. 4, the reserved right recognized by the Wyoming courts is for less acreage than that now in irrigation by non-Indians on the Reservation.

[66] Pet. App. 607a; J.A. (Wyo. Sup. Ct.), Vol. X, U.S. Exh. C-18.

gate less than 24 acres per resident tribal member, and thirty years from now that number will likely drop to 11 acres per member. These figures fall far below the size of farming allotments provided by the 1868 Treaty (up to 320 acres per family and up to 80 acres for individual adults). Pet. App. 797a.

The quantification is also not excessive within the context of this proceeding. The Wyoming courts recognized reserved rights for some 108,000 practicably irrigable acres, only some 6,000 more than was originally proposed by Wyoming. *See supra* note 12. The Wyoming courts rejected some 50,000 acres of historic and future lands claimed by the United States or the Tribes to be practicably irrigable.[67] Pet. App. 72a. The courts based their quantification of reserved rights solely on the irrigation needs of the Reservation, rejecting all claims of reserved rights based on purposes other than farming, such as mineral extraction, fisheries and municipal uses. Pet. App. 32a-43a.

Finally, contrary to Wyoming's suggestion that the quantification was excessive because the Tribes do not need additional water for future irrigation development, the Reservation is in desperate need of economic development, both agricultural and non-agricultural. A recent study funded by the State, the Tribes, and the Bureau of Indian Affairs revealed that the unemployment rate on the Reservation was 71 percent and that the incomes of 75 percent of the Indian families were below federal "low income" and "poverty" standards. WINDS Project, Executive Summary (reproduced herein at Appendix E, at 25a, 27a). The study concluded that "the Wind River Reservation represents an area that is chronically economically depressed" and "is characterized by an astoundingly high rate of unemployment, and unusually high needs for services in the areas of health, alcohol and drug

[67] The Tribes are seeking review of a number of the rulings resulting in these reductions in their Cross-Petition in No. 88-492.

abuse, education, quality of housing, economic development, sanitation, and related areas." *Id.* at 32a.

The water quantified in this proceeding is desperately needed to respond to these economic conditions. A large portion of the award—almost 60 percent [68]—is for historically irrigated acreage, and thus the economic potential of most of this water is already being tapped.

The promise of this litigation, in terms of the efforts of the Tribes to solve the serious problems on their Reservation, lies in the reserved water that was awarded for lands—some 54,000 acres—not yet in irrigation. It is precisely that water that the State is challenging here as excessive. That award—the full measure of what is available for future development—is enough to irrigate only an additional 12 acres per resident tribal member. It cannot seriously be maintained that this award to the Tribes is an excessive amount of water with which to pursue the express promise of the 1868 Treaty: for the Indians to "make said reservation[] their permanent home." Pet. App. 796a.

5. *Wyoming's Proposed Quantification Standard Is at Odds with This Court's Prior Decisions.*

Wyoming's proposed alternative to the PIA standard is based on an amalgam of legal premises previously rejected by this Court.[69] The suggested "opportunity for

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[68] *See supra* note 16.

[69] Wyoming urges (Br. 48) this Court to adopt a standard that focuses on whether an Indian reservation has had "an opportunity" (not even an ample opportunity) "to fully develop its agricultural industry," and, if not, whether "there is a quantifiable need for additional water to serve lands which can realistically be expected to be irrigated in the future." In addition, if any Indian land is subject to state water rights, the trial court must determine whether "additional Federal reserved water rights are necessary to meet the reservation's agricultural needs." *Id.* All this is to be "circumscribed" by a "sensitive application of the reserved water right doctrine," taking into account "the impact of the reserved

full irrigation" rule would result in a retroactive application of the "use it or lose it" proposal that this Court has long rejected in Indian water-rights cases. *See supra* pp. 35-38. Wyoming's proposed rule that reserved rights exist only if Indian lands are not covered by state water rights flies in the face of the well-settled proposition that Indian reserved rights "vest" and become "effective" at the time an Indian reservation is created, and the long-standing principle that Indian treaty rights are not abrogated by implication. *See supra* pp. 40-43. Finally, the suggestion that the quantification of Indian reserved rights be "circumscribed" by a consideration of the impact on non-Indians has been repeatedly rejected by this Court since *Winters*. *See supra* pp. 32-34. In short, the proposed standard is simply a wish list that ignores the last eighty years of decisions regarding Indian reserved water rights.[70] It should therefore be rejected.

III. Any Modification of the PIA Standard Should Be Prospective Only.

In the event that this Court modifies the PIA standard, the modified standard should not be applied in this case. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964) ("On the record in

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water right on non-Indians using water under state law." *Id.* at 15-16.

[70] The proposed standards of many of the various state amici also include factors that are based on legal premises long rejected by this Court. Moreover, most of the proposed standards of the state amici fail to provide any guidelines to trial courts, *e.g.*, Brief of Amici Salt River District at 18 ("Solomonic balancing of a myriad of factors"), and thus appear to be nothing more than an attempt on the part of the states to leave the quantification of Indian water rights to the discretion of state trial judges. If this approach were taken, this court would be unable to subject these state court decisions to the "particularized and exacting scrutiny" promised by this

the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants."); *cf. Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971).

Basic fairness requires that result. In reliance on this Court's holding in *Arizona I* that PIA is the "only feasible and fair" way to measure the water reserved for irrigated farming, and on Wyoming's own request that the PIA standard be adopted, the Tribes have expended their scarce financial resources for a decade of litigation on the basis of that standard, and the Wyoming courts properly applied *Arizona I* here. The Tribes have finally achieved a quantification of their reserved water right that, while far less than what they sought, will permit them to proceed to a modest extent with desperately needed economic development that has been impossible throughout this protracted litigation while the quantum of their reserved right was uncertain. If this Court should now modify the PIA standard and make its new holding applicable to this case, the Tribes would be relegated to further years of uncertainty, legal expense and deprivation of development. The case for prospective-only application of a modified standard could hardly be more compelling.

Court when it determined that such cases are to be tried in state court. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

CONCLUSION

For the foregoing reasons, the holding of the Supreme Court of Wyoming that the PIA standard is the appropriate measure of the reserved right under the 1868 Treaty for the irrigation needs of the Tribes should be affirmed.

Respectfully submitted,

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April 12, 1989

APPENDICES

APPENDICES

APPENDIX A

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

STATE OF WYOMING'S RESPONSE TO THE UNITED STATES' STATEMENT OF CLAIMS AND TO THE STATEMENT OF THE SHOSHONE AND ARAPAHOE TRIBES CONCERNING THE MEASUREMENT OF TRIBAL RESERVED WATER RIGHTS

COMES NOW, the State of Wyoming (hereinafter "Wyoming"), by and through the Attorney General, and sets forth its response to the Statement of Claims filed by the United States on March 5, 1980, the United States Supplemental Claim, and to the Statement of the Shoshone and Arapahoe Tribes Concerning the Measurement of Tribal Reserved Water rights filed on April 6, 1980. Wyoming's brief in support of this Response is appended hereto and incorporated by reference as if fully set forth herein.

I. *General Position of Wyoming*

Except as admitted below, Wyoming denies, pursuant to W.R.C.P. 8(b), that the United States and the Shoshone and Arapahoe Tribes (hereinafter "Tribes") are entitled, as a matter of fact and law, to the water rights which they claim.

II. *General Denial of Reserved Rights in Wyoming*

* * * *

III. *Limitation of the Reserved Water Right Generally*

With respect to any reserved right which the Court may determine to exist on behalf of the United States or Tribes in this litigation and incorporating all the foregoing by reference:

1. Wyoming affirmatively asserts that no reserved water right exists unless the United States intended specifically to create said right on behalf of a specific individual reservation of land in Water Division No. 3.

2. Wyoming affirmatively asserts that the United States intended to create those reserved water rights claimed by it or the Tribes only if the primary purposes of the reservation for which the right is claimed would be entirely defeated without the use of water for those purposes.

3. Wyoming affirmatively asserts that any reserved water right awarded by the Court for any individual reservation must be precisely quantified in terms of each specific reservation purpose(s) which the right is claimed as necessary to fulfill.

4. Wyoming affirmatively asserts that, with respect to each reservation herein, the United States intended to reserve only the minimal amount of water necessary to prevent the primary purposes of the reservation from being entirely defeated.

5. Wyoming affirmatively asserts that the United States intended to reserve water, if any, only to fulfill the primary purposes of any reservation claimed herein, and not to fulfill secondary purposes of said reservations.

6. Wyoming affirmatively asserts that, in determining the amount of any reserved water right

awarded herein, the Court must consider the scope of the injury which will be caused by said right to competing appropriative water rights which have been awarded by Wyoming and must limit said reserved right to minimize injury to owners and users of appropriative rights.

* * * *

IV. *Wind River Indian Reservation*

With respect to the claims for the use of water associated with the Wind River Indian Reservation, pages 1 through 16 of the United States' Statement of Claims and pages 1-9 of the Statement of the Shoshone and Arapahoe Tribes concerning the Measurement of Tribal Reserved Rights, and incorporating all of the foregoing by reference.

1. Wyoming denies that any reserved rights exist on behalf of the Wind River Indian Reservation for those reasons stated at Sec. II, above.

* * * *

9. Even if the Court determines that the United States did create a reserved water right when it created the Wind River Indian Reservation, Wyoming affirmatively asserts that no reserved right on behalf of said reservation exists except as created by the United States in trust for and on behalf of the Indians on the Reservation.

* * * *

11. Even if the Court determines that the United States did create a reserved water right when it created the Wind River Indian Reservation, Wyoming affirmatively asserts that said right may be exercised only to provide the minimal amount of water necessary to prevent the purposes of the Reservation from being entirely defeated.

12. Wyoming affirmatively asserts that the purpose of the Wind River Indian Reservation was and is to convert the Indians from a nomadic to an agricultural people.

13. Wyoming denies that it is the purpose of the Wind River Indian Reservation to provide a permanent home for the Shoshone and Arapahoe tribes, except as that statement of the Reservation's purpose intends to reflect that the Reservation was created to convert said tribes from a nomadic to an agricultural people.

14. Pursuant to said purpose, Wyoming admits that, if a reserved water was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, for the irrigation of all practicably irrigable land on said Reservation, and for stockwatering uses.

15. Wyoming denies that the United States is entitled to the amounts of water claimed for irrigation, domestic, and stockwatering uses at pages 1-4 of its Statement of Claims and denies the United States' claim of practicably irrigable acres on the Wind River Indian Reservation.

16. Wyoming denies that the Tribes are entitled to the amounts of water claimed for irrigation uses at pages 1-7 of their Statement of the Shoshone and Arapahoe Tribes concerning the Measurement of Tribal Reserved Water Rights and denies the Tribes' claims of practicably irrigable acres on the Wind River Indian Reservation.

17. Wyoming affirmatively asserts that the measure of any reserved water right which may be determined by the Court to exist for the benefit of the Wind River Indian Reservation is strictly defined and limited in its quantity by the pur-

pose of the Wind River Indian Reservation as stated in paragraph no. 12. As is more fully described in Appendices A, B, and C hereto, and on the basis of information currently available to Wyoming, said purpose authorizes the use of the following quantities of water as a maximum amount for the uses specified by paragraph no. 14, above:

Irrigation (Appendix A) 323,176 acre-feet per annum

Livestock (Appendix B) 414 acre feet per annum

Domestic (Appendix C) 1604 acre-feet per annum

18. Wyoming denies that the United States intended to reserve or did reserve any water to serve any purpose of the Wind River Indian Reservation or any water use thereon except those specified by paragraphs no. 12 and no. 13, above.

* * * *

26. Wyoming affirmatively asserts that the quantities of water described above are maximum quantities to which the United States may possibly be entitled under its reserved water right on behalf of the Wind River Indian Reservation, if any, based upon information currently available to Wyoming.

27. Wyoming affirmatively asserts that the quantities of water described above may be increased or reduced and quantities may be assigned to additional reserved water rights claimed by the United States as additional information becomes available. Wyoming reserves the right to amend its response as may be necessary to include such

information in the response as that information becomes available.

* * * *

29. Wyoming denies that the United States may be awarded a reserved water right for irrigation uses, if any, in this litigation for lands for which studies of irrigation feasibility are not completed and for which irrigation feasibility has not been proved prior to the termination of the taking of evidence in this matter.

30. Wyoming denies that any reserved water right may be granted to account for the speculative future development of allegedly cultivable lands existing on the Wind River Indian Reservation as claimed at pages 5-6 of the Statement of the Shoshone and Arapahoe Tribes Concerning the Measurement of Tribal Reserved Water Rights.

* * * *

44. Wyoming admits that the priority date for any reserved water right found by the Court to exist for those portions of the Wind River Indian Reservation held in trust by the United States for the Indians which were never disestablished is July 3, 1868.

* * * *

APPENDIX A

Basin	Practicably Irrigable Acres	Amount (Acre-Feet/Annum)
	* * * *	
Total Irrigation		
Historic	34726	121561
Future	67205	201615
Total	101931	323176

[Dated: July 16, 1980]

APPENDIX B

[STATE SEAL]

STATE OF WYOMING
OFFICE OF THE GOVERNOR
Cheyenne 82002

MIKE SULLIVAN
Governor

FOR IMMEDIATE RELEASE
FRIDAY, FEB. 17, 1988 [*sic*; 1989]
Contact: Dennis Curran, 777-7434

SULLIVAN, TRIBES SIGN INTERIM AGREEMENT

Gov. Mike Sullivan and officials of the Joint Business Council of the Shoshone and Arapaho Tribes on Friday signed a one-year interim agreement regarding water and tax issues on the Wind River Indian Reservation.

The interim agreement still must be approved by the Wyoming Legislature and the United States Government.

The agreement was signed in Cheyenne by Sullivan; John Washakie, chairman of the Shoshone Business Council; and Burton Hutchinson, chairman of the Northern Arapaho Business Council.

If approved by the Legislature and federal government, it will take effect on April 1 and will resolve for the next year the two principle disputes between the tribes and the state.

"This interim agreement we sign today is merely a first step in a complex process, but it is a historic first step," Sullivan said. "It signifies the strong desire of both the state and the tribes to resolve our disputes over water and taxes amicably and fairly for all parties."

Under the terms of the interim agreement, the tribes will receive from the state:

(1) $2 million in cash for use in compensating Indian irrigators for possible drought-related crop losses this summer and for such other purposes as the Joint Business Council may decide.

(2) A reduction of 4½ percent of the state's 6 percent severance tax on oil and gas production on the Wind River Reservation. This reduction will permit the Tribes to raise approximately $2 million in additional tribal tax revenues during 1989 without increasing total tax burden on reservation oil and gas producers.

(3) $1.3 million in grants for rehabilitation and expansion of existing water delivery systems on the reservation and for a study of potential water storage sites on the reservation.

In return, the tribes agreed to share water equally among all irrigators in the six federal irrigation projects on the reservation (Crowheart, Ray, Coolidge, Johnstown, Sub Agency and Left Hand units), based on total irrigated acreage for each particular tract.

Outside of the six federal irrigation projects, water is to be allocated in accordance with historical priority dates attached to the lands.

The tribes also agree not to seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the reservation, including the county's ad valorem tax on oil and gas production.

Sullivan and the tribal leaders said an important objective of the interim agreement is to facilitate the negotiation of a long-term settlement of the tax and water issues on the reservation.

The tribes and the state will seek to reach such agreement during the coming year.

The interim agreement will not affect the litigation of the water rights case in the United States Supreme Court, now set for argument in April. Nor will the agreement have any effect after it expires in a year.

However, Sullivan and the tribal leaders said the agreement is a precedent-setting example of tribal-state cooperation on water and tax matters and may serve as a model for other tribes and states.

Sullivan joined the tribes in thanking all those involved in the negotiations as well as the Fremont County legislators and the citizens of Fremont County who have lent their support.

APPENDIX C

TRIBAL-STATE INTERIM SETTLEMENT AGREEMENT ON TAX AND WATER ISSUES

During the term of this Agreement, the Shoshone and Northern Arapaho Tribes (the "Tribes") of the Wind River Indian Reservation (the "Reservation") and the State of Wyoming (the "State") agree as follows:

1. Water on the Reservation is to be allocated (a) within the six (6) federal irrigation projects (Crowheart Unit, Ray Unit, Coolidge Unit, Johnstown Unit, Sub Agency Unit, Left Hand Unit) in accordance with the principle of equally shared surpluses and shortages, if any, in a manner that reflects traditional rotation practices for each such project, and (b) outside of the above projects in accordance with historical priority dates attached to the lands outside of such projects. In applying the principle of equally shared surpluses and shortages, if any, water shall be allocated to individual tracts of land based on the total amount of irrigated acreage in each tract, rather than the size or number of headgates for the particular tract.

2. The Tribes and the State, in coordination with the Bureau of Indian Affairs, shall cooperate in jointly monitoring and managing water allocations on the Reservation.

3. The State shall reduce its severance tax on oil and gas production on the Reservation from six percent to one and one-half percent.

4. The Tribes may amend the rate of their severance tax on oil and gas production on the Reservation. The tribal tax rate is now equal to four percent plus the current state and county rates of taxation. The amended tribal rate shall not exceed eight and one-half percent plus the then-current state and county rates of taxation.

5. The Tribes shall not seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the Reservation, but the Tribes are free to participate as amici curiae in cases not involving the Reservation and as amici curiae in any refund proceedings involving taxpayers on the Reservation. The Tribes shall retain the current credit in the tribal tax on oil and gas production for state and county taxes paid by Reservation taxpayers.

6. The State shall provide $1,000,000 in grant funds for rehabilitation and expansion of existing water delivery systems within the Reservation. In consultation with the State Engineer, the Tribes shall define, develop budgets for, and prioritize the projects to be supported by these grant funds. As each such project is initiated, the State shall disburse funds to the Tribes up to the above total amount in accordance with the budgets and priorities for the defined projects; provided, however, that the State's obligation to the Tribes under this Agreement as to any unspent funds shall terminate on March 31, 1994. The Tribes shall return to the State any funds not spent in accordance with the above budgets and priorities.

7. The Tribes, in consultation with the Bureau of Indian Affairs, shall establish a fund and procedures for compensating Indian water users for possible losses arising from the accommodations provided by the Tribes in Paragraph 1. The State shall provide $2,000,000 in cash to the Tribes for use in this compensation fund, and any amount not allocated to the fund may be expended for such other purposes as the Tribes may decide. The payment from the State shall be due within thirty days of the effective date of this paragraph of the Agreement.

8. The State shall provide $300,000 to be used to fund a reconnaissance study of potential water storage sites on the Reservation and a study of improvements needed for the rehabilitation and expansion of existing water

delivery systems on the Reservation. These studies shall be conducted for the Tribes and the State by a consulting firm or other entity, and according to terms, mutually agreed upon by the Tribes and the State. If feasible, such studies shall be completed no later than October 1, 1989. If the Tribes are able to arrange alternative funding in whole or in part for these studies, or if the cost of these studies is less than $300,000, the remaining amount committed by the State for these studies shall be added to the funds available under paragraph 6 of this Agreement for use in rehabilitating and expanding the existing water delivery systems on the Reservation.

9. The Tribes and the State shall negotiate in good faith to reach a long-term settlement of the tax and water issues on the Reservation.

10. If the Tribes and the State are able to reach a long-term agreement regarding the tax and water issues on the Reservation, the Governor shall support legislation needed to implement the terms of such agreement, including significant funding for rehabilitation of water delivery systems and pre-construction engineering studies for water storage sites. The Tribes and the State agree to cooperate in seeking federal funding to offset these costs.

11. The Tribes and the State shall create a committee by each appointing one representative to discuss disagreements and issues arising out of this Agreement.

12. The effective dates of the terms of this Agreement are contingent upon obtaining the necessary approval of the Department of Justice and upon the enactment of implementing legislation by the State Legislature as follows: If the State Legislature has enacted implementing legislation by April 1, 1989, and the Department of Justice has not disapproved the Agreement as of that date, Paragraphs 1, 2, 3, 4, and 5 of this Agreement shall take effect on April 1, 1989, but shall cease to become

effective if the approval of the Department of Justice is not obtained by May 1, 1989, unless this date is extended by written agreement of the State and the Tribes. The remaining paragraphs of this Agreement shall take effect when the State Legislature has enacted implementing legislation and the approval of the Department of Justice has been obtained; provided, however, that if such legislation is not enacted or such approval is not obtained before May 1, 1989, this entire Agreement shall become null and void, unless extended by written agreement of the Tribes and the State.

13. The various terms of this Agreement shall remain in effect for one year from the effective date of each such term as set forth in paragraph 12, except (a) as provided in Paragraph 6 for the disbursement of unspent water delivery system funds, and (b) as provided in Paragraph 10 for the Governor to support certain legislation if the Tribes and the State reach a long-term agreement on tax and water issues; provided, however, that if there has been a material breach of the Agreement that is not resolved or reconciled by the committee described above in Paragraph 11, this Agreement may be terminated by the non-breaching party sooner than one year from the effective date or dates.

/s/ John R. Washakie — Feb. 17, 1989
JOHN WASHAKIE, Chairman — Date
Shoshone Business Council

/s/ Burton Hutchinson — Feb. 17, 1989
BURTON HUTCHINSON, Chairman — Date
Northern Arapaho Business Council

/s/ Mike Sullivan — Feb. 17, 1989
MIKE SULLIVAN, Governor — Date
State of Wyoming

APPENDIX D

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

WYOMING'S BRIEF IN SUPPORT OF ITS RESPONSE TO THE CLAIMS FOR WATER RIGHTS OF THE UNITED STATES AND THE SHOSHONE AND ARAPAHOE TRIBES

This brief is submitted in support of the State of Wyoming's Response to the claims for water rights of the United States and the Shoshone and Arapahoe Tribes. Wyoming's Response is incorporated herein by this reference as if fully set forth.

* * * *

C. ANY RESERVED WATER RIGHT FOR WHICH MAY EXIST ON BEHALF OF THE WIND RIVER INDIAN RESERVATION IS LIMITED IN QUANTITY TO THAT AMOUNT NECESSARY TO FULFLL THE AGRARIAN PURPOSE FOR WHICH THE RESERVATION WAS CREATED

1. *The Single Primary Purpose of the Wind River Indian Reservation Was and Is to Create An Agrarian Indian Society*

The United States and the Shoshone and Arapahoe Tribes claim that Congress, when it authorized the creation of the Wind River Indian Reservation, intended to

reserve for the use of the Tribes enough water to fulfill all present and future water needs for agriculture, stock-watering, fisheries and wildlife on and off the reservation, mineral development, municipal, industrial and commercial development, aesthetics, and any other development that is part of the advancing arts of civilization. Legal Parameters for United States' Statement of Claims at 6-7; Tribal Pretrial Brief at 8-9. Wyoming, however, contends that Congress intended to reserve only enough water, if any, to meet the agrarian needs of the reservation Indians. Any additional water needs are to be acquired according to state law in the same manner as is required for all other citizens of the state. An examination of the limited purposes and rationale for which Congress authorized the creation of the Wind River Reservation, as well as other Indian Reservations in the western United States, leaves little doubt that the expansive claims of the United States and the Tribes are completely lacking in support.

In the mid-and later 1800s many Indian Reservations were established in the western United States. The Federal government had a dual purpose in creating these reservations. First, it wanted to open up the West to non-Indian miners, ranchers, farmers, and other settlers. While avoiding the constant conflict between resident Indians and incoming settlers. Second, the government wanted to provide a homeland for the Indians so they could change from their nomadic ways and "become a pastoral and civilized people." *Winters v. United States*, *supra* at 576. It was in answer to these desires in the four state area of Colorado, Utah, Wyoming and Idaho that the United States entered into a treaty with the Shoshone Indians resulting in the creation of the Wind River Indian Reservation. The Treaty was signed by the parties at Fort Bridger on July 3, 1868 and ratified by Congress on February 26, 1869. 15 Stat. 673.

It is clear from a careful reading of the Fort Bridger Treaty, other similar treaties, and judicial decisions interpreting these treaties that the purpose for establishing the Wind River Indian Reservation was to create a permanent, pastoral community for the Indians.

* * * *

It must not be inferred, however, from the limited holdings regarding purposes which these latter cases state, that the Courts rendering them have not given detailed consideration to all possible additional reservation purposes. The opposite is true. In *Arizona v. California*, *supra*, in granting a reserved right measured by irrigation uses only, the Court noted "water from the (Colorado) river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." 373 U.S. at 599. Despite its observation, the Court's analysis of the treaty lead to the conclusion that the reserved water right was limited to irrigation needs. 373 U.S. at 600-01. The Master and the court realized that water was necessary for the animals hunted by the Indians but the Court's decision determined the Treaty indicated no intent by Congress to reserve water for wildlife purposes. * * * A review of all the cases discussed demonstrates that courts will uniformly limit any implied reserved water right on Indian Reservations to agricultural needs unless the Treaty or Executive Order creating the reservation specifically names additional primary purposes for establishing the reservation and unless such purposes would be entirely defeated without an additional reservation of water.

A reading of the Treaty of July 3, 1868, establishing the Wind River Indian Reservation was a product of the same era which produced the treaties analyzed by the foregoing cases. Its terms reveal that it was entirely consistent with the prevailing policies of the United States in that era in purposely creating a reservation

designed to convert the Indians on it to an agricultural people.

* * * *

The expansive reserved water right claims made by and on behalf of the Tribes are completely lacking in support. Reference to the language of the 1868 Treaty, case law interpreting the treaty, judicial decisions interpreting other similar treaties, as well as logic and reality support Wyoming's contention that the reserved water right, if any, for the Wind River Reservation is limited to the minimal amount necessary to fulfill the irrigation and related domestic and stockwatering needs of the Indians residing thereon. In making this contention Wyoming is not attempting to deprive the Indians of the right to develop minerals, build cities, start industries or participate in any other aspect of modern American society. Wyoming, however, recognizes that any water reserved under the 1868 Treaty is limited to the purposes for which the reservation was created, i.e., agriculture. Any additional water needs must be met by the acquisition of water rights in accordance with state water law. Wyoming is thus not preventing the Indians from developing their lands, but is simply requesting the court to recognize that all water needs of the Indians beyond those impliedly reserved must be acquired in the same manner as is required of all other citizens of the state. Wyoming does not feel this to be an unfair or unduly burdensome request.

* * * *

D. THE QUANTITY OF WATER RESERVED FOR THE WIND RIVER INDIAN RESERVATION, IF ANY, IS THAT AMOUNT OF WATER SUFFICIENT TO IRRIGATE ALL THE PRACTICABLY IRRIGABLE ACREAGE ON THE RESERVATION AND FOR RELATED DOMESTIC AND STOCKWATERING USES

The United States and the Tribes have made expansive reserved water claims for the Wind River Reservation.

The amount of water reserved, if any, is limited to that amount necessary to fulfill the purposes for which the reservation was created. It is clear from the discussion in Part C, above, that the purpose for creating the Wind River Reservation was strictly limited to agriculture. Therefore, any quantification of a reserved water right must be limited to agricultural needs. In *Arizona v. California*, *supra*, the court adopted the decision of the Master in measuring the extent of Indian reserved water rights. The Master concluded that the fair and equitable measure of the Indian reserved right is that amount of water needed to irrigate all the practicably irrigable acreage on the reservation. *Id.* at 600-01. Later decisions have followed this method of quantifying Indian reserved rights. *See*, *Colville Confederated Tribes v. Walton*, *supra*, at 326; *United States v. Anderson*, *supra*, at 15. Wyoming contends that if any reserved water exists for the Wind River Reservation, the quantity of reserved water is to be measured by the amount of water necessary to irrigate the practicably irrigable acreage presently in Tribal hands and to meet related domestic and stockwatering needs. Practicability of irrigation must be determined by reference to the date of the reservation since only in this manner can the intent of the federal government to reserve water be properly measured. Even if practicability may be measured by reference to modern technology lands for which studies of irrigation feasibility are not completed and for which irrigation feasibility has not been proven prior to the termination of the taking of evidence in this matter, cannot be considered in determining the quantity of any reserved right. The quantification is based on practicability, not possibility. Practicability signifies that a feasibility study has been done. Possibility only signifies that if a feasibility study were done it might indicate that the land is practicably irrigable. Without feasibility studies it would simply be impossible for a court to carefully and properly quantify a reserved water right. In addition, if modern technology

may be considered in determining practicably irrigable acreage it must also be considered as a limitation of the reserved water right because of the increased efficiency of modern irrigation techniques.

The United States and the Tribes apparently concede that the proper measure of any reserved water rights for irrigation needs is practicably irrigable acreage. United States' Statement of Claims at 1-3; Tribes' Pretrial Brief at 14. The Tribes, however, try to obfuscate the proper meaning and purpose of this term by making two superfluous arguments. First, they contend that in calculating practicably irrigable acreage the Master must look at all lands within the exterior boundaries of the reservation presently and potentially held in trust for the Tribes, including lands presently owned by non-Indians which may be reacquired by the Tribes in the future. Tribes' Pretrial Brief at 20. This argument defies reason and law. A reserved water right for irrigation must be based on actual reservation of land not on possible future additions to a reservation. Once reservation acreage leaves Tribal hands it cannot be considered in determining the quantity of reserved water. To hold otherwise would be contrary to all prior reserved rights cases *Winters v. United States, supra; Arizona v. California, supra; United States v. New Mexico, supra; Cappaert v. United States, supra*; and would further interfere with the State's duty to manage water use within the State. Second, the Tribes seek an open-ended quantification whereby the amount of reserved water could be periodically adjusted upward as the Tribes expand their use of water into areas heretofore unknown or unprofitable. Tribes' Pretrial Brief at 14-16. They rely on *Arizona v. California, supra*, and *United States v. Anderson, supra*, in support of this proposition. Such reliance is entirely misplaced. In *Anderson* the court stated, "(t)he quantification of the Tribes' reserved rights is based upon the amount necessary to irrigate all the practicably irrigable acreage on the reservation and as such is designed to

meet the future as well as the present needs of the tribe." *Id.* at 15. The court did retain jurisdiction, as was done in *Arizona v. California*, but declared that such retention was only for the purpose of allowing "for a modification of the judgment on showing of a substantial change in circumstances, unanticipated in the Court's quantification herein, resulting in a need for water greater than the amount reserved for future needs." *Anderson*, *supra* at 15. In the adjudication leading to *Arizona v. California*, *supra*, the Master refused to adopt an open-ended decree because he felt that would place all junior water rights in jeopardy of the uncertain and the unknowable. Master's Report at 230-31, (May 5, 1960). He instead quantified the Indians reserved right based on practicably irrigable acreage and intended this to be the extent of the reserved right. *Id.* at 232. The Supreme Court approved of this reasoning and the quantification of reserved water but still retained jurisdiction. *Arizona v. California*, *supra*, 373 U.S. at 601. The Tribes, in support of their position, place great weight on the courts' decision to retain jurisdiction. Tribes' Pretrial Brief at 16. A careful reading of the 1964 and 1979 Decrees issues by the Court, however, demonstrates that the Tribes entirely misread the Courts' purpose in taking this action. The Supreme Court, in fact, intended that the quantification based on practicably irrigable acreage be the extent of the reserved right. *Arizona v. California*, *supra*, at 600. The failure to issue a final decree was only to allow settlement of Indian reservation boundaries, not to allow increases in reserved water based on expansion of uses. *Arizona v. California*, 376 U.S. 340 (1964); *Arizona v. California*, 439 U.S. 419, 421 (1979).

The quantity of reserved water, if any, available to the Tribes residing on the Wind River Indian Reservation must be measured in terms of the amount of water necessary to irrigate all the practicably irrigable acreage presently held by the United States in trust for the

Tribes as well as the amounts needed for related domestic and stockwatering uses. That is the sum of the reserved water right, if any, on the Wind River Reservation and must govern in this case.

• • • •

CONCLUSION

In conclusion, Wyoming affirmatively asserts that there are no reserved water rights for the Wind River Indian Reservation. Even if the Court decides there are such rights they must be limited to water sufficient to meet Indian agricultural needs. The right must be quantified on the basis of practicably irrigable acreage, and the priority dates vary depending on the circumstances.

[Dated: July 16, 1980]

APPENDIX E

"W.I.N.D.S." PROJECT

WIND RIVER INDIAN NEEDS DETERMINATION SURVEY

(Pictures of Chief Washakie and Chief Black Coal Omitted in Printing)

EXECUTIVE SUMMARY

OF

FINAL REPORT, VOL. 1

AUGUST, 1988

"WINDS" Project

(Wind River Indian Needs Determination Survey)

EXECUTIVE SUMMARY OF FINAL REPORT, Vol. 1

Goals

The goals were to assess human resources services on the Wind River Reservation, to determine the true level of services, and to make recommendations, if necessary, to improve the level and quality of services.

Components

(1) "General Population" survey consisting of personal, face-to-face interviews with heads of households.

(2) "Key Person/Agency" surveys consisting of interviews with key personnel of public and private agencies both on and off the Reservation. (Results of this component will be released as "WINDS" Final Report, Vol 2).

Methodology

Households were identified using the County Rural Addressing System. This is the same system that will be used for the 1990 census.

Thirty people were selected and trained as interviewers. These comprised fifteen Arapahoe and fifteen Shoshone.

The instrument used was field tested for three days before implementation.

Random verifications of interviews were conducted periodically.

Stringent measures were taken to ensure confidentiality and anonymity.

Authority

Authority was delegated by the Joint Business Council through a resolution establishing the "WINDS" Needs Assessment Task Force.

Funding

Funding for the project was provided by the State Department of Health and Social Services, Division of Community Programs; Arapahoe Business Council; Shoshone Business Council; and the Bureau of Indian Affairs.

Survey Response

A total of 1,599 personal contacts were made, resulting in 1,532 completed questionnaires, a truly phenomenal response of 96%. During the project planning phase it was hoped that a response of 50% would be achieved. However, it was anticipated that a rate of 35-40% would probably be more realistic. The ultimate response rate of 96% is almost unheard of in most any voluntary survey. Quite obviously, we were extremely pleased with this response. Theories as to why we were so fortunate as to have such an incredible response are outlined in the full report, which accompanies this Executive Summary.

The average age of respondents was 41, of which 81% were heads of their families. Male respondents represented 49.8% and females 50.2%. Descent of respondents was as follows: Arapahoe, 46.6%; Shoshone, 31.1%; Other Indian tribes, 8.6%; non-Indians, 13.7%.

Categorization of Data

Survey results were presented as Reservation-wide, or aggregate information. They were also compiled and analyzed by Reservation area; Arapahoe, Burris, Crowheart, Ethete, Fort Washakie, and Riverton: and by

descent; Arapahoe, Shoshone, other Indian (not Arapahoe or Shoshone), and non-Indian.

(Picture Omitted in Printing)

Demographic/Income Information (Sections 1, 2 and 3)

Of the six Reservation areas, 90% of the population live in the three areas of Arapahoe, Ethete and Fort Washakie. Males comprise 48.6% and familes 51.4%.

Population by descent is: Arapahoe, 45.0%; Shoshone, 26.0%; other Indian tribe, 12.0%; and Non-Indian, 12.1%; plus 4.9% whose descent was undetermined by the survey. The percentage of Arapahoe to Shoshone is: Arapahoe, 63.4% and Shoshone, 36.6%.

Multi-family households constituted 35% of the total households.

Families with *no* income during the past year constituted 46% of the total families. Of the total families, 73% had incomes ranging from $0-$10,000 and 90% were in the income range of $0-$20,000. The average family annual income was $6,277.

Average family income by Reservation area was Arapahoe, $5,856; Burris, $5,191; Crowheart, $8,751; Ethete, $6,968; Fort Washakie, $6,144; Riverton, $2,843.

Average family income by descent was: Arapahoe, $4,972; Shoshone, $5,778; Other Indian tribe, $6,357; Non-Indian, $12,556.

Of all families, 75% were classified as "low-income" or "poverty" families, based upon the federal OMB (Office of Management and Budget) guidelines. The percent of low-income families with *no* income was 61%. The percent of low-income families not receiving per capita payments was 16%. The percent of low-income families with no income and not receiving per capita payments was 10%.

The three areas of Araphoe, Ethete, and Fort Washakie comprised 90% of the low-income families.

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Basic Needs (Section 4)

Some of the more serious problems as seen by respondents were: 82% had problems during the past year with basic transportation services, i.e., getting to the health clinic, to the tribal offices, shopping, etc. Sixty-four percent (64%) had problems with road maintenance during the past year. Some of the other problems relating to basic needs were: 38% had problems getting food; 42% with getting adequate clothing; 34% with getting adequate medical care; 49% had trouble paying utility bills; 34% had problems with their home solid waste system; 39% had problems with receiving Reservation law enforcement services; and 24% had problems regarding their personal housing situation. Conversely, only 11% said that preschool day care was a problem for them, and only 10% said that after school day care was a problem.

Seventy-nine percent (79%) thought that there was a strong need for short-term care for abandoned, neglected, or abused youths or children, and 79% thought that there was a strong need for long-term residential care for youths and children.

Of those interviewed, 94% did not have any garbage pickup. Of those not having garbage pickup, 77% hauled their garbage around five miles, and 6% hauled it over twenty miles. The average hauling distance was five miles. This issue, obviously relates to health hazards. Small land-fills and informal dumping areas, even when used with appropriate controls, can lead to more serious health hazards. For example, both domestic and wild small animals frequently feed from the animal carcasses and general refuse. Consequently, the refuse becomes scattered around the Reservation. Further, the infamous

Wyoming wind tends to blow refuse over the surrounding area.

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Employment (Section 5)

The overall Reservation unemployment rate was 71%. It should be noted that this survey was conducted during the prime employment months and, obviously, the rate would be much higher in other months.

The unemployment rate for each descent was: Arapahoe, 70%; Shoshone, 71%; other Indian tribe, 78%; and non-Indian, 52%.

Indian people employed by Wyoming State Government as of November 30, 1987, constituted thirty-seven full time positions, and four part-time positions. Only about three of these positions are "professional"—the majority being in the area of laundry workers, food services, janitorial, maintenance and homemaker. Of the thirty-seven full time jobs, twenty-five were at the Wyoming State Training School in Lander. There were only six other Indian people employed in the towns of Lander and Riverton, both close to the Reservation.

The average hourly wage for those currently working was $6.96. The average hourly wage for all Fremont County workers was $8.66. Fourteen percent (14%) of those working were classified as "underemployed", or earning less than the minimum wage. The average length of time on their current job was 6.5 years.

For those persons that were unemployed, their average hourly wage on their last job was $5.15 per hour, and 15% had been earning less than the minimum wage. The average length of their last job was 3 years. The average length of unemployment since their last job was 4.1 years. Of those that were unemployed, 75% were employed in Fremont County on their last job.

Of those interviewed, 68% would like vocational job training. Further, 26% were formally trained but were unable to find a job in that same occupation. Seventeen percent (17%) were working in an occcupation for which they had been formally trained.

Of those interviewed, 51% said that they would leave the Reservation for employment. Of those, 5% said that they would relocate within Fremont County, 5% would move anywhere within Wyoming, and 82% would relocate anywhere for a job. Eight percent (8%) had no preference for relocation.

Housing (Section 6)

Some of the more serious problems regarding personal housing situations were: 45% needed replacement of doors; 52% needed more insulation; 56% needed storm windows; 43% needed window replacement; 29% stated that their heat was not adequate in cold weather; 4% did not have electricity; 31% had water that tasted bad; 10% did not have hot and cold running water; 37% had problems with floors and walls pulling apart; 24% had roofs that leaked; 45% needed either replacement of door or repair of door jambs to prevent cold drafts; 21% had sub-standard bathrooms (standard is defined as having a stool, tub or shower, and a wash basin that all work properly); and 16% had septic or sewer systems that did not work.

Of the nineteen possible housing problems listed in the questionnaire, 9% had only one problem; 47% had at least five problems; and 24% had ten or more problems with their housing situation.

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Of all respondents, 23% currently lived with relatives or friends.

Of those interviewed, 33% heated their homes with Propane, 25% with wood or coal, 22% with natural gas, and 18% with electric heat. Two percent (2%) did not have any kind of heat.

Transportation (Section 7)

Of those interviewed, 82% said that the lack of transportation was a serious problem at Wind River. Further, 86% felt that a Reservation-wide transportation system was needed. Of eleven suggestions relating to transportation systems, 90% felt that a simple, Reservation-wide bus system would be the most pragmatic and beneficial. Three percent (3%) replied that their children were unable to attend school because of the lack of transportation.

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Education (Section 8)

Of those interviewed, 37% had attained a high school education. Further, 4% had completed at least four years of college.

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The dropout rate for Wyoming Indian High School at Ethete was 10.8%. The overall Wyoming dropout rate for high-schoolers was 3.3%. The Fremont County dropout rate was 3%.

Of those interviewed, 9% of their family members needed special classes, such as in developmental disabilities, but were not receiving them. Five percent (5%) of their family members were currently in special classes.

Recreation (Section 9)

Seventy-eight percent (78%) thought there were not enough recreation programs for young children, 83% thought that there were not enough for teenagers, and 69% felt that there were not enough for adults.

Ninety-eight percent (98%) stated that recreation programs are very important. When asked why, the primary responses were: 36% said "to keep people out of trouble"; 28% said "something to do"; 8% said "for good health"; 7% said "an opportunity to socialize"; and 10% said that "it discourages substance abuse."

Of those interviewed, 91% thought that there should be bike paths built alongside roadways, as children and youths riding bikes on main roads sometimes put themselves and others in hazardous situations.

Health and Medical (Section 10)

The question was asked, "Do you receive adequate health care from Indian Health Service?" Forty-nine percent (49%) said No. Thirty-eight percent (38%) stated that they were unable to contact a doctor after normal working hours. Fifty-three percent (53%) stated that adult dental services through Indian Health Service were adequate, and 49% stated that children's dental services were adequate. Six percent (6%) needed home nursing services and were not receiving them. Thirty-two percent (32%) needed assistance with nutritional services and 17% needed dietary assistance.

Of those with health coverage, 37% used Indian Health Services, 37% had private health coverage and used local doctors in Lander and Riverton. Fifteen percent (15%) were on Medicare. Forty percent (40%) of those interviewed did not have any kind of health coverage.

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Twenty percent (20%) currently had serious health problems. Of these problems, 29% constituted alcohol abuse, 13% drug abuse, 20% diabetes, 10% heart conditions, along with other conditions.

Concerning alcohol and drug use at Wind River, the question was posed "Is alcohol use or drug use (separate questions) at Wind River: i) no problem, ii) minor problem, iii) serious or very serious problem?"

> Alcohol use: 94.5% believed that it was a very serious problem at Wind River; 4.1% said it was a minor problem, and 1.4% said it was no problem.
>
> Drug use: 85.6% said it was a very serious problem at Wind River; 11.4% said it was a minor problem; 3% said it was no problem.

Regarding county ambulance services, 70% stated that they were adequate. However, 94% felt that a separate Reservation ambulance service was needed.

With respect to animal control, 99.7% of respondents commented that it ranged from "a problem" to "very serious problem." The comments were many and varied, but basically fell into two categories. Primary responses were as follows:

(1) Small, domestic animals: Too many running loose, need chaining or fencing or some kind of control; many are sick and starving; too many running in the housing areas and into garbage. There should be a limit on the number of pets a family can have; many strays run in large packs and frequently chase people and livestock; animals from surrounding towns are often dumped on the Reservation. A dog pound is needed to license pets and pick up and destroy strays. A spay/neuter clinic is needed. In short, a definite health and safety hazard.

(2) Livestock: Too many on roads and in some housing areas; fencing that needs repair; dead animals frequently on road; need livestock regulations; punish

owners of loose livestock; particularly need horse control; need a veterinarian. This also presents health and safety hazards.

Seventy-three point seven percent (73.7%) of the comments related to small domestic animals and 22.4% related to livestock.

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General Summation

The results of this comprehensive needs assessment clearly show that the Wind River Reservation represents an area that is chronically economically depressed. It is characterized by an astounding high rate of unemployment, and unusually high needs for services in the areas of health, alcohol and drug abuse, education, quality of housing, economic development, sanitation, and related areas.

NOTE TO THE READER

The reader of this executive summary is strongly encouraged to read the full report of the "WINDS" project, as the executive summary is merely brief highlights of the project results. The full report should enable the reader to obtain a more comprehensive perspective of Wind River. The primary intent of the project was to determine the quality of services to the Wind River population and, ultimately, to improve the quality of life. The report clearly confirms and illustrates many of the problems and causes of distress on the Wind River Reservation.

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